

RIGHTS AND DEMOCRACY



IN A TRANSFORMATIVE CONSTITUTION

EDITED BY

HENK BOTHA

ANDRE VAN DER WALT

JOHAN VAN DER WALT



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Transformative Constitution

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Henk Botha
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Rights and Democracy
Published by SUN PRESS,
a division of AFRICAN SUN MeDIA,
Victoria Street, Stellenbosch 7600, South Africa
www.africansunmedia.co.za

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First edition 2003
ISBN: 978-1-919980-02-7
e-ISBN: 978-1-919980-26-3
DOI: 10.18820/9781919980263

Cover design by Soretha Botha
and typesetting by Heloïse Davis
Set in 10 on 12 pt Times Roman
Printed and bound by US Printers,
Victoria Street, Stellenbosch 7600

CONTENTS

| | |
|--|-----|
| Preface | vii |
| Foreword | ix |
| Anél Boshoff <i>Law as Dialogical Politics</i> | 1 |
| Henk Botha <i>Rights, Limitations and the (Im)Possibility of Self-Government</i> | 13 |
| Danie Brand <i>The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or 'What are Socio-Economic Rights For?'</i> | 33 |
| Dennis Davis <i>Elegy to Transformative Constitutionalism</i> | 57 |
| Lourens du Plessis <i>Some of Frank Michelman's Prospects for Constitutional Interpretation in South Africa – In Retrospect</i> | 67 |
| Johan Froneman <i>The Impossibility of Constitutional Democracy</i> | 93 |
| Jonathan Klaaren <i>An Institutional Interpretation of Socio-Economic Rights and Judicial Remedies after TAC</i> | 105 |
| Irma J Kroeze <i>God's Kingdom in Law's Republic: Religious Freedom in South African Constitutional Jurisprudence</i> | 117 |
| Hanri Mostert <i>Liberty, Social Responsibility and Fairness in the Context of Constitutional Property Protection and Regulation</i> | 131 |
| André van der Walt <i>A South African Reading of Frank Michelman's Theory of Social Justice</i> | 163 |
| Johan van der Walt <i>Frankly Befriending the Fundamental Contradiction: Frank Michelman and Critical Legal Thought</i> | 213 |
| Karin van Marle <i>Love, Law and South African Community: Critical Reflections on 'Suspect Intimacies' and 'Immanent Subjectivity'</i> | 231 |
| Bibliography | 249 |
| Publications of Frank I Michelman | 265 |

CONTRIBUTORS

| | |
|--------------------|--|
| Anél Boshoff | Associate Professor, Rand Afrikaans University Faculty of Law E-mail [anelboshoff@hotmail.com] |
| Henk Botha | Professor, University of South Africa Department of Constitutional, International and Indigenous Law E-mail [Bothah@unisa.ac.za] |
| Danie Brand | Senior Lecturer, University of Pretoria Department of Public Law E-mail [dbrand@hakuna.up.ac.za] |
| Dennis Davis | Judge of the High Court of South Africa Cape Provincial Division E-mail [DDavis@justice.gov.za] |
| Lourens du Plessis | Professor, Stellenbosch University Department of Public Law E-mail [lmdp@sun.ac.za] |
| Johan Froneman | Judge of the High Court of South Africa Eastern Cape Provincial Division E-mail [jcf@telkomsa.net] |
| Jonathan Klaaren | Professor, University of the Witwatersrand Research Unit on Law and Administration, Wits Law School E-mail [klaarenje@law.wits.ac.za] |
| Irma J Kroeze | Professor, University of South Africa Department of Jurisprudence E-mail [kroezij@unisa.ac.za] |
| Hanri Mostert | Associate Professor, Stellenbosch University Department of Private Law E-mail [hmos@sun.ac.za] |
| André van der Walt | Professor, Stellenbosch University Department of Public Law E-mail [ajvdwalt@sun.ac.za] |
| Johan van der Walt | Professor, Rand Afrikaans University Faculty of Law E-mail [jwgvdw@rau.ac.za] |
| Karin van Marle | Associate Professor, University of Pretoria Department of Legal History, Comparative Law and Legal Philosophy E-mail [kvanmarl@hakuna.up.ac.za] |

PREFACE

It was in May 2001 that the idea of a Festschrift for Frank Michelman first occurred to us. Frank had just turned 65, and we thought a Festschrift might be a fitting way of honouring his contribution to constitutional thought in this country. Just over two years later, the project has come to fruition. In the end, the book is not published formally as a Festschrift, and the title does not bear Frank's name, but it is still, unmistakably, a collection of essays in his honour. All the individual contributions engage with his scholarship: by analysing his work, challenging it, exploring it within the South African context, and/or using it as a tool for the development of theoretical frameworks or avenues of critique.

Frank's ideas have been - and continue to be - a source of inspiration for many of us who are interested in the possibility - and limits - of 'transformative constitutionalism'.¹ His writings on the judicial function and the capacity of rights discourse to facilitate and deepen democratic dialogue are among the most original and thoughtful on the topic - as are his reflections on constitutionalism as a tool for protecting a plurality of cultures, thoughtways and lifestyles; redressing inequality; and promoting social justice. It is therefore hardly surprising that South African legal academics and judges would have turned to his ideas in an attempt to break with the formalism and authoritarianism characterising our legal past, and to make sense of the democratic and egalitarian aspirations of the Constitution. For those who still wish to engage with the Michelman oeuvre, we included a full bibliography of his publications at the back of this volume.

However, the substance of Frank's ideas alone cannot account adequately for the influence he has wielded, or the enthusiasm with which this project has been embraced by fellow academics and judges. There are other reasons as well: his commitment to the democratic transformation of the South African state and society; his engagement, through academic and judges' conferences, but also by means of private correspondence, with South African colleagues; his passion for reasoned argument; and above all, the intelligence, wit, generosity, and dialogical spirit with which he has engaged us. This book is a token of our appreciation for Frank's collegiality and friendship.

The contributions to the book are varied. A number of themes which run through different essays and reflect some of Frank's main theoretical concerns can, however, be identified. One is legal indeterminacy and the politics of law. Some authors rely upon Frank's view of indeterminacy as a condition of normative and doctrinal revision, which is indispensable to constitutional dialogue and the struggles of marginalised groups for recognition. Others raise critical questions about the ability of a legal system that is riven with contradiction to rise above instrumental politics. Johan van der Walt addresses the question to what extent Frank's frank and honest liberalism can address the sacrifices required whenever law is invoked to reconcile fundamentally conflicting interests in society ... Anel Boshoff addresses Michelman's dialogical conception of legal politics against the background of two diverging claims that law and politics should be kept apart, namely, the formalist

1 As far as we are aware, the phrase 'transformative constitutionalism' has been coined by Karl Klare, a close friend of Frank. See K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146.

or conceptualist claim that politics should be kept out of law so as to preserve the integrity of law, and the radical democratic claim that law should be kept out of politics so as to preserve the integrity of politics. A number of essays also engage Frank's writings on the relation between democracy and rights and the problem of democratic self-government (or what he calls the 'paradox of constitutional democracy'). For instance, Johan Froneman deals with the question how the constitutional demand for the rule of law can be reconciled with the democratic demand that the people govern themselves. He addresses in this regard Michelman's arguments as to why the duty and responsibility to effect this essentially impossible reconciliation ultimately falls on the judge.

A second - closely related - theme deals with questions of alterity and difference. Irma Kroeze draws upon Frank's reflections on self-government and difference to criticise the Constitutional Court's failure in freedom of religion cases to question normative assumptions that are embedded in mainstream morality, and to seek to include the marginalised other. Karin van Marle reads Michelman as a hybrid thinker who occupies a space between liberalism and civic republicanism. She argues in this regard that Michelman's adherence to certain basic principles of liberalism necessarily detaches him from the concern with the reflexive horizon of love raised in recent European legal theory.

A third theme relates to the need for judges to engage in practical reasoning and judgment, to explain the moral and political reasons for their decisions, rather than purporting to derive their judgments from 'self-applying' legal materials. Lourens du Plessis explores Frank's reflections on practical reasoning within the context of constitutional interpretation, while Henk Botha looks at it from the perspective of the limitation of rights and debates about judicial balancing.

Finally, a whole range of essays deal with issues of social justice, socio-economic rights, and the need to subject private-law institutions and social and economic power relations to a transformative critique. André van der Walt, Danie Brand and Jonathan Klaaren explore this theme with reference to the issues surrounding the promotion of socio-economic rights in the South African Constitution. In the process, they are able to engage the rich source of publications that Frank has written in this field since 1967 and the emerging case law from the South African Constitutional Court. Hanri Mostert, on the other hand, approaches the tension between the protection of private rights and the promotion of social justice from the perspective of the property clause, arguing that a sound balance between these two goals can be found according to both Frank's writings on property as a constitutional right and German constitutional case law. Dennis Davis criticises the Constitutional Court's reliance, in cases dealing with the horizontal application of the Bill of Rights, on the conceptual tools of the past, and argues instead for a future-orientated or transformative approach.

We wish to thank the University of South Africa for hosting a colloquium in January 2003, where authors presented extracts from their essays and were given the benefit of Frank's direct engagement with their ideas. Thanks also to Gerhard du Toit for his editorial assistance and the bibliography, and to Frederik de Jager of AFRICAN SUN MeDIA for his enthusiasm for the project. We trust that this collection of essays will, in the spirit of Frank's own scholarship, stimulate much further intellectual argument and debate.

Henk Botha
André van der Walt
Johan van der Walt

Editors

FOREWORD

FRANK MICHELMAN

I wouldn't call myself an admirer of Frank Michelman. You admire something from a distance. Frank is friendly, approachable and someone who loves nothing more than a spontaneous interchange of ideas. He manages to be very American and un-American at the same time. On his first visit to South Africa he slipped in a whole range of original and critical ideas without once banging a gong and announcing: 'these are original and critical ideas'. Later, when I was doing a teaching stint at Harvard, he would throw out large concepts as we walked along the corridor or drove in his car, with the casualness of someone speaking about the weather.

When solving a problem you bring into play a whole range of imagined situations and hypotheses. As I write various drafts of my judgments, many figures stand over my shoulder, at my side, above me, jeering, cheering, smiling, and frowning. How can you say this? Lovely phrases, but what do they actually mean? And through the throng of these chattering ghosts come the quiet, reflective, discerning and comitose (note the spelling) interrogations of Frank. How can judges be passionate and dispassionate at the same time, the first about justice and the second about the parties? If parties behave unjustly, should you be dispassionate about them? To what extent do historically constituted mind-sets influence judicial reasoning and the way problems are set out? Is context simply the necessary backcloth against which forensic debate is carried out, or is it part of the very fabric of debate?

My philosophy is that we are all in this together, scholars, judges, public intellectuals, whatever we call ourselves or are called. What matters is the integrity of the dialogue, the willingness to listen and the willingness to speak, the boldness to advance novel interpretations and perspectives and the openness to accept refutation and to acknowledge contrary facts. Without exercising the right to be wrong, we can never be right. Without positing the right to be right, we can never move forward. Unless we are willing to be right/wrong, we end up with the position ironically proposed by Stephen Sedley, namely, that nothing should ever be done for the first time.

Frank listens and speaks. He takes a series of venturesome little steps that end up in terrain that is wholly new and yet apparently not too unfamiliar. Thank you, Frank, for sharing with so many of us your ideas, your life experience, and, above all, your eager yet non-egotistical style.

Albie Sachs

Chamber
Johannesburg
February 19, 2002

ANÉL BOSHOFF

LAW AS DIALOGICAL POLITICS

I SETTING UP THE LAW/POLITICS DICHOTOMY

‘Law is politics.’ This infamous phrase has the brevity and provocative character of a political slogan, rather than the meticulous and clear nature of legal exposition.¹ Since it was first expressed by members of the Critical Legal Studies movement, it has been widely and passionately contested. However, like most political slogans its apparent simplicity hides a complex range of interpretations and as a result opposition to the conceptual unification of law and politics springs from divergent ideological sources. Running the risk of oversimplification I shall divide the objectors into two groups. On the one hand there are those (the traditionalists) who see the law as an essentially objective and value-neutral system, capable of finding the correct interpretation of legal rules and impartially applying it to the facts. The credibility of the law as normative system is dependent on keeping it *pure* – clearly separated from the contaminating force of politics. On the other hand there are those (the radicals) who also support the separation of law and politics – their aim, however, is not to keep law pure, but rather to keep politics safe from the pervasive and restrictive influence of the law.

The traditionalist view, that law should be protected from the corrupting influence of politics, enjoys near universal support. After all, the capacity of the law to yield objective answers, ‘right’ answers, depends on maintaining the division. The law, on this account, guarantees protection against the despotism of ‘men’² – against the unmodulated personal or irrational preferences registered in politics. More particularly, the law shields the weak from the naked political power wielded by the strong. The denial of the theoretical separation of law and politics therefore strikes terror in the hearts of traditionalist lawyers. It undermines or threatens to undermine the very project of ‘law’. In Owen Fiss’s words ‘[It] will mean the death of the law, as we have known it throughout history, and as we have come to admire it’.³

The law/politics dichotomy, according to the traditionalists, also implies a certain hierarchical order, namely with law privileged as superior to politics. The ‘law’ side of the dualism is associated with positive values such as reason, objectivity, impartiality and public virtue. Politics, on the other hand, is associated with the negative values of will, subjectivity, bias and personal preferences. Goodrich et al provide us with the following description of the traditionalists’ conception of the law:

1 Many would say this proves the difference between law and politics, and hence the inaccuracy of the statement.

2 The phrase ‘government of laws and not of men’ entered American legal consciousness when used in *Marbury v Madison* 5 U.S. (1 Cranch) 137, 193 (1803).

3 O Fiss ‘The death of law?’ (1986) 27 *Cornell Law Review* 1.

For the bulk of modern jurisprudence, the law is public and objective; its posited rules are structurally homologous to ascertainable ‘facts’ that can be found and verified in an ‘objective’ manner, free from the vagaries of individual preference, prejudice and ideology. Its procedures are technical and its personnel neutral. Any contamination of law by value will compromise its ability to turn social and political conflict into manageable disputes about the meaning and applicability of pre-existing public rules.⁴

However, the merging of law and politics also comes under attack from a different, even opposite direction. According to a more radical view the real danger is not politics destroying law, but rather law infiltrating politics, turning all questions into ‘legal’ questions. The jeopardy we must guard against is the juridification of society, where law ‘colonises’ and thus impoverishes all aspects of society. Here we find the same law/politics dualism, but the political sphere is regarded as privileged or superior to that of the law.

II MICHELMAN’S COLLAPSING OF THE DICHOTOMY

In his 1988 Stevens Lecture, Frank Michelman makes the rather forthright statement that ‘law is best understood as a form of politics’.⁵ This assertion comes in reply to Fiss’s sharp attack on the Critical Legal Studies movement for collapsing the distinction between law and politics that would, according to Fiss, jeopardise the future of law as we know it. Fiss, clearly from the perspective of a traditionalist, sees the values underlying politics as irreconcilable with that of the law. Explaining the dissimilarity between constitutional adjudication (law) and legislating (politics), he says:

Legislatures ... are not ideologically committed or institutionally suited to search for the meaning of constitutional values, but instead see their primary function in terms of registering the actual, occurrent preferences of the people – what they want and what they believe should be done.⁶

This statement, as Michelman correctly observes, indicates a particular understanding of what is meant by politics (and presumably also of what is meant by law). Michelman then proceeds to distinguish between *instrumentalist* politics (usually referred to as *pluralist* politics) and what he terms a *dialogic* conception of politics. Sunstein explains the basic features of a pluralist conception of politics thus:

[P]olitics consists of a struggle among interest groups for scarce resources. Laws are a kind of commodity, subject to the forces of supply and demand. Various groups in society compete for loyalty and support from citizens. Once they are organized and aligned, they exert pressure on political representatives who respond, in a market-like manner, to the pressures thus exerted.⁷

Pluralist politics are characterised by self-interested ‘deals’ between political actors and aggregating citizen preferences through majority rule. According to this view political decisions should reflect real existing preferences, in other words, there should be no attempt at

4 P Goodrich et al ‘Introduction. Politics, ethics and the legality of the contingent’ in Goodrich et al (eds) *Politics, Postmodernity and Critical Legal Studies. The Legality of the Contingent* (1994) 17.

5 FI Michelman ‘Bringing the law to life: a plea for disenchantment’ (1989) 30 *Cornell Law Review* 256.

6 O Fiss ‘The Supreme Court 1978 Term – Foreword: The forms of justice’ (1979) 93 *Harvard LR* 3 at 10.

7 C Sunstein ‘Beyond the republican revival’ (1988) 97 *Yale LJ* 1539 at 1542.

collective control over citizen preferences. Deliberate or self-conscious ‘preference-shaping’ or attempted ‘character formation’ is regarded as a form of official tyranny to be avoided.⁸

It is quite clear why politics, if seen as a strategic interplay of preferences, is regarded as the converse of law. The ultimate nightmare haunting the legal traditionalists is the judge making decisions under pressure exerted from various sectarian interest groups, entering into self-promoting ‘deals’ or indulging private desires. However, according to the republican view, an alternative conception of politics is possible; a so-called dialogical conception that would not lead us into the abyss of blind and selfish adjudication.

Michelman points out two features that differentiate dialogical politics from pluralist politics: First, politics in a dialogical sense is seen as a normative activity – ‘[a] contestation over questions of value and not simply questions of preference’.⁹ These values – representing public reason rather than private will – are formulated through a process of deliberation,¹⁰ through ‘persuasion not ... power’.¹¹ Sunstein explains the consequences of this belief in political deliberation:

The function of politics, on this view, is not simply to implement existing private preferences. Political actors are not supposed to come to the process with preselected interests that operate as exogenous variables. The purpose of politics is not to aggregate private preferences, or to achieve an equilibrium among contending social forces. The republican belief in deliberation counsels political actors to achieve a measure of critical distance from prevailing desires and practices.¹²

Behind the idea of politics as a form of normative deliberation is the optimistic belief in the *possibility* of mediating different approaches to the ‘common good’. In fact, even prior to that, is the belief that the notion of the ‘common good’ is at all coherent. This brings us to the second distinctive feature of dialogical politics pointed out by Michelman, namely *pragmatism*. With this Michelman means that the activity of politics is a historically and culturally situated activity – always bound to a specific context – without, however, being foundationalist. Political actors can, at the same time, be ‘bound’ or answerable to a particular public normative history and culture *and* maintain a critical distance from it.¹³

This conception of politics, as ‘good-faith, normative, pragmatic dialogue’ is indeed compatible with – in fact, hardly distinguishable from – contemporary legal argument.¹⁴ It does not matter, as Michelman puts it, whether ‘you want to call it law or politics’.¹⁵ For Michelman’s dialogical politics to correspond to law, we must of course also assume a certain brand of legal discourse. Law must be seen as a discursive activity, in other words, as a dialogical process whereby the participants by way of public reason establish normative values. Seen like this law and politics share the same basic predicament: some context-specific values and inner

8 Sunstein (note 7 above) 1544 explains the problems inherent in this pluralist conception, e.g. that some preferences might be objectionable (such as racism) or distorted by disparities in power and information.

9 Michelman (note 5 above) 257. See also Fraser ‘Talking about needs: Interpretive contests as political conflicts in welfare-state societies’ (1989) 99 *Ethics* 291 at 292–296.

10 See also Sunstein (note 7 above) 1548.

11 Michelman (note 5 above) 257. See also Michelman ‘Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation’ (1989) 56 *Tenn LR* 1508.

12 Sunstein (note 7 above) 1548–1549.

13 This aspect of Michelman’s theory will be discussed more fully in par [4] below.

14 Michelman (note 5 above) 258 refers specifically to Dworkin’s conception of ‘law as integrity’ where the judge must simultaneously be consistent and critical.

15 Michelman (note 5 above) n. 44 refers to adjudication as ‘one institutionally specialized form’ of dialogical politics.

coherence are required (to prevent indeterminacy and ultimately nihilism), and paradoxically, these values must be open to critical re-interpretation or 'recollective imagination'.¹⁶ Operating within the framework of a normative history the participants must be critical towards that same history. The judge must tread a thin (or non-existent) line between being rational and objective on the one hand and being critical and creative on the other. He must occupy the space between uncritical 'deference to authority and unmodulated preference'.¹⁷ According to Michelman it is a false belief that

[judges] need to choose between the self-indulgent or partisan politics of preference on the one hand and the disciplined objectivity of following a plain and simple, pre-ordained and externally dictated rule on the other hand.¹⁸

A notion of pragmatic normative dialogue could serve as 'a point of mediation and *rapprochement*'¹⁹ between politics and law. Unlike the traditionalists Michelman sees this contested space as political rather than antipolitical.

To sum up: Michelman apparently succeeds in overcoming what most thought to be a perpetual and crucial dichotomy. The hostile stand-off between law and politics has been settled. Enemies have turned into allies. The method whereby Michelman has achieved this reconciliation is by postulating a distinctive conception of politics to correspond to his conception of law. Both conceptions are (in his words) idealised versions of actual practices. They are what we aspire to – 'politics as it ought to be, and can be, and sometimes is, and frequently is not' – in other words *utopian*.

Michelman's utopian vision of law and politics as compatible systems, as two versions of the same social project – two sides of the same coin, so to speak – raises two fundamental concerns. The first difficulty is the im/possibility of radical dissent or dispute. Our ability to reflect on and criticise the legal system depends to some extent on our ability to create some distance from the legal theme. In order to subject the law to radical critique generated by other rules and vocabularies, thus preventing autopoietic or autonomous self-legitimizing by the legal system, we need to have a position 'outside' the system. The first question is thus whether the radicals are not correct in asserting that the sphere of politics should be kept separate from that of the law. If the system (the law) and its environment (politics) are kept apart,²⁰ does this not maintain the integrity of the environment, making it possible for us to preserve our critical distance from the legal system? I shall argue that this is not the case.

The second difficulty with Michelman's position is his assumption that some kind of Rawlsian 'overlapping consensus' would be automatically guaranteed.²¹ *Contra* Michelman, I shall argue that collapsing the distinction between law and politics does not require a retreat into the politics of rational consensus and united public discourse. Postulating some kind of value-laden *democratic ethos* as a prerequisite for the viability of the legal system, disregards

16 See D Cornell 'Institutionalization of meaning, recollective imagination and the potential for transformative legal interpretation' (1988) 136 *U Pa LR* 1135. R Unger *The Critical Legal Studies Movement* (1986) 18-19 refers to this process as 'internal development'.

17 Michelman (note 5 above) 266.

18 Michelman (note 5 above) 267.

19 Ibid.

20 Cf e.g. WT Murphy 'Systems of systems: Some issues in the relationship between law and autopoiesis' (1994) *V Law and Critique* 262.

21 J Rawls 'The idea of overlapping consensus' (1987) 7 *Oxford J of Legal Studies* 1-25.

the possibility of true dissent. It fails to take into account the position of the radical other, those whose views cannot be assimilated into that of 'the community', or the community that generates, as Michelman puts it 'our values – ours collectively, all of ours'.²²

The question then remains whether it is possible to agree with Michelman that 'law is best understood as a form of politics', while questioning his optimistic belief in the capacity of 'good-faith, normative, pragmatic dialogue' to find the so-called common good. In other words, is the collapsing of the distinction between law and politics reliant upon our acceptance of his idealised versions of both systems? I shall try to demonstrate that this is not so. The legitimisation of the legal system also depends on the individual ethical demand for justice. The gap between 'calculable law' and 'incalculable justice' makes it possible to criticise abstract general rules from the perspective of *some immediate situation*, '[some] concrete conditions of living'.²³ I shall try to indicate that the process of confronting the law by intimate worlds of individuals is closer to postmodern literary irony than to ideological dogma. I shall discuss each of the points of criticism briefly before proceeding to stating this alternative (tentatively).

III LAW AND POLITICS AS IDEOLOGICAL/MYTHICAL SYSTEMS

Modern law – with its universal focus on human rights – has created optimism about the legal system's ability to regulate all social systems effectively. This utopian vision sees law as the omnipotent regulator, exerting benign control over all areas of human existence: from individual behaviour to state-citizen relations to the relations between states in the arena of international law. In the opening paragraph of his book *The End of Human Rights* Costas Douzinas explains this sentiment:

A new ideal has triumphed on the world stage: human rights. It unites left and right, the pulpit and the stage, the minister and the rebel, the developing world and the liberals. ... Human rights have become the principle of liberation from oppression and domination, the rallying cry of the homeless and the dispossessed, the political programme of revolutionaries and dissidents.²⁴

However, the use of law as a medium of control over society has been criticised. On the one hand critical scholars, who have tried to show a direct causal link between political forces and the law, have run up against empirical evidence that this relationship is far more complex than was originally anticipated.²⁵ In other words, law is never (or hardly ever) a simple and direct tool for achieving political or economic objectives.²⁶ On the other hand, the legal system's expanding influence has been criticised on a more fundamental or principled level. Habermas, for instance, objected to

22 Michelman (note 5 above) 260. His emphasis.

23 J Příbáň 'Beyond procedural legitimation: Legality and its "inflections"' (1997) 24 *Journal of Law and Society* 331 at 340.

24 C Douzinas *The End of Human Rights. Critical Legal Thought At the Turn of the Century* (2000) 1.

25 See M King 'The "truth" about autopoiesis' 1993 *Journal of Law and Society* 218 at 222.

26 King (note 25 above) 232 notes: 'Changes in the letter of the law which appear to favour certain social groups may also reinforce a particular image of members of that group. This paradox has long been recognized by feminist scholars in their analyses of the law's protective role towards women's interests'. See also C Smart 'Women of legal discourse' (1992) *Social and Legal Studies* 29.

the juridification of the life world ... the tendency towards an increase in written law [which include] the legal regulation of hitherto informally regulated social systems ... colonising cultural reproduction, social integration and socialisation and destroying traditional patterns of social life.²⁷

Law's binary code of lawful/unlawful or legal/illegal is,²⁸ according to this view, not an appropriate response to complex and value-laden issues.²⁹ The function of the law is to reduce societal complexity to a manageable level. From a legal perspective it becomes unnecessary to challenge or problematise everything: the law makes a simple lawful/unlawful distinction and could/should not be expected to do more than that. The 'juridification' of all societal problems (by categorising them as so-called human rights problems) reduces the range of possible solutions to include only unsuitable formal and value-neutral legal responses, thus excluding more nuanced and complex political responses.

From the viewpoint of autopoietic theory one can say that the legal system is 'normatively closed'. This means that it is self-referential in the sense that it governs its own operation by devising its own internal rules, including its own vocabulary. The legal system can only communicate with other systems (such as economic, political or religious systems) by 'translating' its communication into its own language. King and Schütz explain as follows:³⁰

[I]t 'understands' the complexity of the external environment, by reducing that environment to its own terms. Within the legal system, for example, specialized courts, procedures, and conceptual devices are continually being developed to enable law to deal with new problems emerging from the increasingly complex ways in which modern society defines itself and its operations. Since no system can go beyond the boundaries set by its binary code, the internal complexity of the system must necessarily be limited by its selectivity – in the case of law, its coding of lawful/unlawful (legal/illegal).³¹

Without doing justice to the complexity and sophistication of the systems theory and its exponents, I want to make two remarks, the first being a practical (lawyerly?) objection and the second more theoretical or fundamental in nature. First: King observes that autopoietic theory is incapable of identifying the factors in legal administration and decision-making that cause injustice and inefficiency in individual cases. Hence it is also incapable of making any suggestions as how to remedy these defects. Autopoiesis explains the broader evolution of social systems, but does not explain why a judge reaches a certain decision in a particular case. Comparing it with Darwin's theory of evolution, he says, 'to expect autopoiesis to explain individual legal decisions is like asking evolutionary theory to account for the death of a pet

27 J Habermas *Theorie des kommunikativen Handelns* (1981) 204, quoted by King (note 25 above) 222. See also G Poggi *The Development of the Modern State: A Sociological Introduction* (1978) referring to the law as the medium through which cultures and ethics are appropriated to the service of power. Nelken 'Changing paradigms in the sociology of law' in G Teubner (ed) *Autopoietic Law: A New Approach to Law and Society* (1988) 281–282 sees law as 'the great concealer, hiding the fact of violence at the basis of the social order'.

28 See N Luhmann 'The coding of the legal system' in A. Febbrajo & G Teubner (eds) *State, Law, Economy as Autopoietic Systems* (1992).

29 Cf for example child-custody disputes.

30 X King and X Schütz 'The ambitious modesty of Niklas Luhmann' 1994 *Journal of Law and Society* 261 at 277.

31 Modern law is thus described as 'normatively closed', but 'cognitively open', King (note 25 above) 226 or, as Teubner puts it 'open in a closed sort of way' as described by P Kennealy 'Talking about autopoiesis – order from noise' in Teubner (ed) (note 27 above) 349–368.

dog'.³² As justice is located exclusively within the realm of the individual case (as life is located within the pet dog), the theory might simply be of no use to us.³³

The second objection to the construction of law as a tightly restricted and closed system goes to the very nature and function of the legal system. Reducing unmanageable complexity by standardising expectations is without doubt one of the functions of the legal system. However, this reduction is never a value-free, logical and transparent exercise. It is rather an ideological activity – in the truest sense of the word.³⁴ In order for a system to be classified as 'ideological' two factors must be present: first, it must present a 'naturalization' of the symbolic order³⁵ and second, it must function in an inherently non-transparent way.

As far as the first factor is concerned, one can say that ideology is present whenever the results of discursive procedures are reified as being the 'thing itself'. Michel Pêcheux points out that one of the fundamental stratagems of ideology is referring to the 'self-evident'³⁶ – 'Look, you can see for yourself how things are!' (or – 'You can see for yourself what the law says') is possibly the arch-statement of ideology. Neither facts nor legal rules 'speak for themselves', they are always 'made to speak' by a network of discursive devices. It is impossible to divide language into clear-cut categories of 'descriptive' and 'argumentative' statements. Following Ducrot, Žižek notes that 'every description (designation) is already a moment of some argumentative scheme; descriptive predicates themselves are ultimately reified-naturalized argumentative gestures'.³⁷ Laclau explains that meaning does not inhere in elements of an ideology as such – these elements act as so-called free-floating signifiers whose meaning is fixed by way of 'hegemonic articulation'.³⁸ Žižek uses the example of ecology that can be appropriated by a number of different even opposing ideologies – depending on who wins the battle for discursive hegemony. The same is true for a number of legal elements – 'human rights' being perhaps the best and most widespread example.

The second (related) factor indicating the presence of ideology is the non-transparent nature of the social domination. '[T]he very logic of legitimizing the relation of domination must remain concealed if it is to be effective'.³⁹ This factor goes hand in hand with the first one: if the system and its interpretation of the elements are believed to be unproblematic, self-evident and descriptive, there is no perceived need for inquiry. The system presupposes the invisibility of the mechanisms that regulate its efficiency.

Far from being a simple functional (albeit rather blunt) tool for settling individual legal disputes, the law is a vast and powerful mythical system, a 'generative matrix that regulates the

32 King (note 25 above) 230.

33 King (note 25 above) 230 partially redeems the usefulness of the theory by stating '[I]n a more general way, it may, through identifying the major trends in the development of law in different areas, be able to offer some sobering thoughts on the capacity of law to regulate the behaviour of other systems'.

34 This does not, as might be thought, imply any purposeful deception on the part of the legal system and its operators. S Žižek points out that ideology has nothing to do with 'illusion', 'with a mistaken distorted representation of its social content. ... [A] political standpoint can be quite accurate ('true') as to its objective content, yet thoroughly ideological', 'The spectre of ideology' in Žižek (ed) *Mapping Ideology* (1994) 1 at 7. He points out (10) that in the Enlightenment tradition, 'ideology' stands for the blurred ('false') notion of reality caused by various 'pathological' interests, e.g. fear of death, or power interests.

35 See R Barthes *Mythologies* (1950).

36 'The mechanism of ideological (mis)recognition' in Žižek (ed) (note 34 above) chap 6.

37 Žižek 11.

38 E Laclau *Politics and Ideology* as quoted by Žižek 11.

39 Žižek 8. He therefore states: '[T]he starting point of the critique of ideology has to be full acknowledgement of the fact that it is easily possible to *lie in the guise of truth*'.

relationship between visible and non-visible, between imaginable and non-imaginable'.⁴⁰ The law's verdict 'This is lawful' and its reason 'because the law says so' not only refer to a limited case-by-case problem solving mechanism.⁴¹ These statements cover vast areas of intimate human existence; they frame the ethical, social and political boundaries of society and culture.

One of the tasks of postmodern critique of ideology is to examine the social myths that form the cultural substratum of what is regarded as 'true' or 'natural' – to question 'what goes without saying'. The myth of the law indeed attempts to reduce differences of interpretation and limit the excesses of meaning. Through deconstructionist theory we can 'denaturalize' the symbolic order of the law by bringing to the light of day the discursive and power-laden procedures that underlie it.⁴² (However, if we go so far as to denounce the very notion of extra-ideological reality, in other words, if we accept that there is nothing but ideology, that what we experience as 'reality' is only a plurality of discursive practices, it might render the very project of critique unfeasible.) The question is whether it is possible to assume a place that enables us to maintain a distance from the ideological system, without simply replacing one system for another. Žižek paradoxically states that '*this place from which one can denounce ideology must remain empty, it cannot be occupied by any positively determined reality* – the moment we yield to this temptation, we are back in ideology'.⁴³ I shall return to this statement in due course.

To conclude: although sympathetic to the 'radical' stance, that politics should be kept safe from the stifling effect of law, I think that the conceptual exercise of reducing law to a self-contained mechanism for solving legal disputes, ignores the insidious power of the law as a mythical/ideological system, thus making radical critique of the system impossible. Although agreeing with Michelman that the dichotomy between law and politics should not be maintained, I nevertheless want to question whether his idealised versions of these two systems thus become inevitable.

IV ASSUMING TOO MUCH?

Michelman, in explaining the merits of his dialogical conception of law and politics, provides us with two possible meanings of the word 'public'. In an *epistemological* sense a value can be called 'public' if it is 'demonstrable to persons other than its initial proponent in a way that leads to its recognition and acceptance by those persons'⁴⁴ – in other words, if it is intersubjective. However, 'public' can also have a more *political* meaning where it refers to a value that is 'justifiably ascribed to a political community, as that community's value'.⁴⁵ He then makes it clear that when he speaks about law and politics as a contestation

40 Žižek 1.

41 C Douzinas and R Warrington 'A well-founded fear of justice: Law and ethics in postmodernity' (1991) 2 *Law and Critique* 115 at 147 criticise Lord Donaldson's assertion that justice 'is not used in a general sense as the antonym of "injustice" but in the technical sense of the administration of justice in the course of legal proceedings in a court of law'. Such a restricted meaning, identifying justice only with court proceedings, would, according to them, shut the door of law's protection.

42 Žižek (note 34 above) 11 notes that Paul de Man explains that deconstructionist theory met with such resistance because it 'denaturalizes the enunciated content by bringing to the light of day the discursive procedures that engender evidence of Sense'.

43 Žižek 17.

44 Michelman (note 5 above) 262.

45 Ibid.

over questions of public value, he means ‘public’ in the political sense of the word: the values are ‘ours collectively – all of ours’.⁴⁶

With this definition Michelman seems to insist on going one step beyond mere intersubjectivity for the purposes of discursive justification. To be able to explain, to ‘give reasonable reasons’, is not enough – this intersubjectivity must be ‘concretized in joint awareness of a shared ethical-cultural consciousness’.⁴⁷ To illuminate the consequences (if any) of this statement, I shall refer in brief to the well-known dialogue between Habermas and Michelman. The question can be framed thus, in Michelman’s words: ‘[H]ow far and in what respects [are] legal discourses bound to the cultural contingencies of forms of life in historically specific societies?’⁴⁸ According to Habermas republicanism goes wrong by insisting on a ‘necessary connection between the deliberative concept of democracy and the reference to a *concrete, substantively integrated community*’.⁴⁹ Republicanism seems to presuppose the existence of a community whose members already share a fully determinate set of normative (political) values – values that are constitutive of their identity as members of the community. The consequences of such an assumption for a truly pluralist society (and most modern societies, I think, qualify as pluralist) might be conceived as a type of ‘parochial ethnocentrism’.⁵⁰ According to Habermas, Michelman’s references to the ‘common good’ and ‘a common past’ simply assume too much. As Bernstein puts it: ‘[A]ny adequate procedural democratic theory for contemporary societies cannot simply assume that all citizens will be like the Founding Fathers of the United States’.⁵¹ Referring to Michelman and Sunstein, Habermas writes:

As long as deliberative politics is rejuvenated in the spirit of Aristotelian politics, this idea depends on the virtues of citizens orientated to the common good. And this expectation of virtue pushes the democratic process, as it actually proceeds in welfare-states mass democracies, into the pallid light of an instrumentally distorted politics, a ‘fallen’ politics.⁵²

Republicanism, in its insistence that ‘only virtuous citizens can do politics in the right way’⁵³ cannot, according to Habermas, deal with the ‘facticity of modern pluralistic democratic societies’.⁵⁴

However, Bernstein argues convincingly that there is in reality not such a big divide between Habermas’s position and that of the republicans. Habermas’s discourse theory has always struggled with the deep and unresolved conflict between its more transcendental or universal procedural requirements, on the one hand, and its pragmatic or substantial normative requirements, on the other.⁵⁵ The procedural requirements for rational dialogue (equal space, time and opportunity) are supplemented by substantial requirements, prescribing *how* we

46 Michelman (note 5 above) 260. His emphasis.

47 Michelman ‘Habermas on law and democracy: Critical exchanges: Liberalism, republicanism, and constitutionalism’ (1996) 17 *Cardozo LR* 1163.

48 Ibid.

49 J Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (translated by Rehg) (1996) 258. My emphasis.

50 R Bernstein ‘Habermas on law and democracy: Critical exchanges: Law, morals and ethics: The retrieval of the democratic ethos’ (1996) 17 *Cardozo LR* 1127 at 1135.

51 Bernstein 1133.

52 Habermas (note 49 above) 277.

53 Habermas 278.

54 R Bernstein (note 50 above) 1137 writes: ‘[Habermas] wants to root out the “moralism” and the “purity of heart” of those who seek to place exclusive weight on the virtue of individual citizens.’ In this regard he refers to Hegel’s devastating portrait of the dangers of a ‘republic of virtue’ in *The Phenomenology of Spirit*.

55 R Bernstein *The Restructuring of Social and Political Theory* (1976) 219–225.

should listen and talk to each other. Habermas has always acknowledged that formal procedural requirements would not suffice to justify a discourse theory – by itself it will not produce the framework for finding true consensus. Sitting on two chairs, being transcendental and pragmatic at the same time, makes it possible to speak of a ‘substantial-ethical procedural democracy’,⁵⁶ and it makes it feasible to accept that no democracy is possible without some kind of ‘democratic ethos’ – an ethos that ‘conditions and affects how discussion, debate, and argumentation are practiced.’⁵⁷ Bernstein makes the useful (Rawlsian) distinction between so-called thick and thin conceptions of ‘substantial-ethical’ convictions. Although a ‘thick’ or strong conception might create the impression of a bad sort of ethnocentrism or Eurocentrism, a ‘thin’ or minimum conception of substantial-ethical commitments is a prerequisite for engaging in democratic debate, discussion and persuasion.

Even if we accept, with Bernstein, that there is no real difference in principle between Michelman and Habermas – at most a difference in degree – the question remains whether they both assume too much. Some critics describe a discourse theory that assumes the common will of citizens to participate in communication as a ‘collectivization of reason’ which ‘identifies rational argumentation only with discursive, that is, collective processes’.⁵⁸ In a rather menacing way Příbář describes the way in which discourse theory ignores the intimacy of individual life:

Habermas believes in the united space of politics and rational order which enables people to participate in its construction and give it concrete meaning. He supposes that every individual struggles for such participation and fulfils the ideal of humanity in it. Intimacy, on the other hand, is the sphere of the singular which ignores rules and the judgements of any pre-existent audience. The division of the private and the public world vanishes in it because intimacy knows only the autonomy of the individual unfounded in subjection to a certain universal game which could be controlled by an a priori determined and chosen audience.⁵⁹

Habermas, on this version, fails to escape the Enlightenment paradox of the individual who is given freedom provided that he or she becomes the subject of some universal binding rules or procedures. It excludes the possibility of ‘individuals mapping their personal horizons and limits and discovering their singularity; to become autonomous beings with individual interests and goals ... the possibility of living within the heterogeneous space of many little “truths”, together with them and in their neighbourhood’.⁶⁰

Even if this line of criticism is dismissed as arising from a kind of radical individualist stance, the pervasive problem of pluralism still remains. Can discourse theory accommodate our disagreements – not only within the parameters of someone’s version of ‘reasonableness’ but also outside of it? Can it acknowledge that our differences are profound and incommensurable, that despite our best efforts we might still fail to reach even a minimum level of consensus, that the indispensable ‘democratic ethos’ has a myriad of interpretations?

56 Bernstein (note 50 above) 1129.

57 Bernstein (note 50 above) 1136.

58 Příbář (note 23 above) 334. See also Weinberger ‘Basic puzzles of discourse philosophy’ (1996) 9 *Ratio Juris* 172.

59 Příbář 334–335. In a rather gigantic leap he relates this to the evil depicted by Milan Kundera in *The Unbearable Lightness of Being* (1984) 100: ‘[B]ehind Communism, Fascism, behind all occupations and invasions lurks a more basic, pervasive evil ... the image of that evil was a parade of people marching by with raised fists and shouting identical syllables in unison’.

60 Příbář 334.

Michelman's idealised versions of law and politics as forms of reasonable dialogue are enormously attractive, until we ask what precisely they presuppose.⁶¹ We cannot but ask

[w]ho decides what is and what is not an argument, by what criteria, and what constitutes the force of the better argument? ... [T]here are rarely (if ever) any algorithms or clear criteria for determining this in non-trivial instances. ... Is the very idea of a 'rational consensus' in such concrete conflictual contexts even intelligible?⁶²

For the sake of argument I shall assume (too much, perhaps), that discourse theory – both Michelman's and Habermas's versions – cannot provide an adequate response to the deep pluralism that leads to 'concrete conflictual contexts'.⁶³ In poststructuralist fashion one can say that it fails to acknowledge the heterogeneous ethical demand that derives from the care of the Other, the responsibility for the Other.⁶⁴ In reducing the idea of justice to rationally calculable, albeit discursive, principles, other possible notions of justice are excluded. I want to conclude with the cautious postulating of one such alternative notion.

V AUTONOMOUS INDIVIDUAL (EVERYDAY) LIFE

It is often suggested that the legitimisation of both modern law and political domination (whether they be the same thing or not) is dependent on the general validity of legal rules. However, our central demand for equal treatment, for formal equality before the law, comes with a price – it inevitably implies the *abstract* definition of conditions and limits of humanity and the 'subjection of individual life and freedom to the abstract regime of rules'.⁶⁵ Inherent in this demand hides Kafka's permanent threat 'that humans will come to the situation "before the law", where they will be unable to give any meaning to general rules and orders and feel resigned before the incomprehensible and absurd force of the law'.⁶⁶ Keeping Kafka's sense of the impenetrability and force of the legal system in mind, I shall argue that the law can only be legitimate if it is also *comprehensible* from the perspective of the immediate individual situation. Radical critique of the law thus depends on the singularity of being of each individual that confronts the abstract system – it derives from the concrete conditions of living, or the *heterogeneous* demands for justice.

Příbáň states, correctly I think, that law can only be legitimate to the extent that it is open to external criticism – criticism deriving from rules and vocabularies outside the ideology of the legal system. The problem is that aspiring to this 'outsider' position very often means replacing one public ideology with another.⁶⁷ From the perspective of the intimate sphere of human authenticity and individual everyday life we might, however, view and criticise the legal system as at least partly 'unaffiliated' outsiders. Such a vantage point may provide us with a

61 Cf A Boshoff 'Constitutional interpretation: Between past and future' (2001) 12 *Stellenbosch LR* 357 at 363.

62 R Bernstein *The New Constellation: The Ethical-political Horizons of Modernity/Postmodernity* (1995) 221. He mentions the current debate about abortion as an example of such a concrete context.

63 Ibid.

64 See, for example, E Lévinas *Otherwise than Being* (1981) and *Ethics and Infinity* (1985).

65 Příbáň (note 23 above) 340.

66 Příbáň (at 340) uses Kafka's metaphorical text 'vor dem Gesetz' – translated as 'before the law', to convey a rather menacing sense of the individual confronted by an incomprehensible system of force.

67 This, I think, might be the case when the legal system is evaluated from the perspective of the political system.

space not occupied by ‘any positively determined reality’⁶⁸ – Žižek’s ‘empty’ place – from which we can denounce ideology. With reference to Luhmann one can say that we create an ‘environment’ (individual authenticity) for the ‘system’ (the law) without lapsing into public doctrine. Agnes Heller in *The Postmodern Political Condition* sees everyday life with its authenticity as a separable part of the social and, in a certain sense, as the presocial (presystemic) reality of humankind.⁶⁹ Our sphere of human intimacy (the environment of the legal system) belongs to that presocial and therefore prelegal reality. As the myth of language gets ‘interrupted’ by literature⁷⁰ – precisely to the extent that literature does not come to an end – so the myth of the law gets interrupted or deconstructed by each ‘singular being’ confronting the legal system with a radically unique life-world.

The interaction between the impersonal system of general legal rules and procedures on the one hand, and the singularity of concrete human beings, on the other, brings into play the seemingly infinite gap between law and justice. According to Derrida justice is incalculable, it is a matter of situated ethics rather than a matter of abstract truth. Justice does not depend on a priori meanings – it is that which is to be done, which is yet to be decided.⁷¹ ‘[T]here is no justice except to the degree that some event is possible which, as an event, exceeds calculation, rules, programs, anticipations and so forth.’⁷² The narrative of the law must bridge the divide between normative structures of the law and the ethics which precede any normativity and which derive from the asymmetrical relation to the Other. The legitimation of the law can thus be seen as a narrative about justice in concrete social, historical and legal conditions. Evaluating the law from the perspective of individual justice is never a fixed or formal procedure – it will vary from one time and place to another. It has to be reopened and reconsidered with each new encounter between individual and system.⁷³

Referring back to autonomous individual everyday life challenges the seemingly value-free, neutral legal system with existential and ethical questions of justice and fairness. It compels the legal (and political) system to become comprehensible to us, without, however, withdrawing into some unattainable utopian vision of united public discourse – a discourse that recognises only subjects constructing the rational collective will, not individuals in their singularity.

68 Par [3] above.

69 A Heller & F Feher *The Postmodern Political Condition* (1988) 31-32.

70 J-L Nancy *The Inoperative Community* (1991) 78. See P Lenta ‘Law and literature: a genre resi(gh)ted’ 2002 TSAR 419-435.

71 See J-F Lyotard *Just Gaming* (1985) 73-74 and B Reading *Introducing Lyotard* (1991) 111.

72 J Derrida ‘Force of law: The “mystical foundation of law”’ in D Cornell et al (eds) *Deconstruction and the Possibility of Justice* (1992) n 50 at 27.

73 Seeing the law as a closed autopoietic system will negate this process, as would basing it solely on the communicative procedures of discourse theory.

HENK BOTHA

RIGHTS, LIMITATIONS, AND THE (IM)POSSIBILITY OF SELF-GOVERNMENT

I INTRODUCTION

Section 36,¹ the general limitation clause in the Bill of Rights in the 1996 Constitution, raises difficult questions about the resolution of conflicts between individual rights and the public interest,² the structure of fundamental-rights litigation,³ styles of constitutional adjudication (e.g. a more formal categorisation approach versus a flexible balancing approach),⁴ the

- 1 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.'
- 2 S 36 is clear that the rights in the Bill of Rights are not to be considered absolute, but are subject to reasonable limitations. It therefore seems inappropriate to conceive rights as 'trumps' over collective considerations or rigid and immutable 'boundaries' beyond which political majorities may not reach. In the view of some commentators, the rights in the Bill of Rights are better understood as standards of justification (E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' 1994 *SAJHR* 31); as an occasion for dialogue about the meaning of constitutional commitments and the cogency of justifications offered for the limitation of fundamental rights (see H Botha 'Democracy and Rights: Constitutional Interpretation in Postrealist World' (2000) 63 *THRHR* 561 at 575–576. See also, in the Canadian context, D Beatty 'The End Of Law: At Least as we Have Known It' in R Devlin (ed) *Constitutional Interpretation* (1991) 22; and PW Hogg & AA Bushell 'The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall LJ* 75.)
- 3 The inclusion of s 36 (and its predecessor, s 33 of the interim Constitution) has given rise to a two-stage inquiry into fundamental-rights disputes: *S v Zuma* 1995 4 BCLR 401 (CC) par [21]; *S v Makwanyane* 1995 6 BCLR 665 (CC) par [100]–[102]. The first stage involves an inquiry into the meaning and scope of the constitutional right[s] in question, and the question whether a right has been infringed. If an infringement is found, the Court then turns to the second question: whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. While it is well settled that a two-stage approach should be followed, the proper division of work between the two stages remains a bone of contention. See S Woolman 'Limitation' in M Chaskalson et al *Constitutional Law of South Africa* (1999 5th rev service) 12–17 to 12–26.
- 4 S 36, along with other provisions in the Bill of Rights, seems to require judges to break with the formalistic and authoritarian mindset which tended to characterise the apartheid legal order, and to embrace instead a style of adjudication that can be called substantive and contextual – one that is characterised by a sensitivity to power relations (exercises of power need to be justified) and candour about the values and policy considerations informing a judge's reasoning. In the absence of bright-line boundaries between individual rights and legitimate exercises of public power, a judge cannot simply invoke the authority of the Constitution, as if the Constitution speaks to us directly, unmediated by the interpretations of relevant social actors and legal decision-makers. Judges must take responsibility for their decisions; they must articulate the political morality or social vision through which their readings of constitutional provisions are filtered. In the view of the Constitutional Court, s 36 involves

separation of powers,⁵ and the degree of judicial activism or restraint that is proper in fundamental-rights cases.⁶

In this essay, I look at limitation analysis from the perspective of Frank Michelman's democratic and constitutional theory. My aim is not to try to distil a systematic and workable limitation test from Michelman's writings, nor to enlist his academic stature in support of my favoured approach to limitation analysis.⁷ It is, rather, to enquire whether and how Michelman's views on constitutional interpretation and the relationship between democracy and rights may enrich theoretical debates about the meaning and implications of section 36 of the Constitution.

An examination of Michelman's views on these topics could be helpful for at least two reasons. In the first place, Michelman sets great store by the ability of practical reasoning and dialogue to set limits to power.⁸ He regularly stresses the need for judges to judge; to engage in

'the weighing up of competing values on a case-by-case basis to reach an assessment founded on proportionality'. *S v Manamela (Director-General of Justice Intervening)* 2000 5 BCLR 491 (CC) par [33]. See also *S v Makwanyane* note 3 above par [104]. The language of proportionality and balance suggests a willingness to engage with the relevant social and legislative context; to provide substantive reasons for decisions; to give due consideration to all the competing considerations, on a principled yet nuanced and flexible case-by-case basis, located in South African reality yet guided by international experience, articulated with appropriate candour and accomplished without losing sight of the ultimate values highlighted by our Constitution.

Sachs J (dissenting) in *Prince v President of the Law Society of the Cape of Good Hope* 2002 3 BCLR 231 (CC) par [155].

- 5 The use of a value-based, context-sensitive standard to determine the reasonableness of legislative and other limitations of fundamental rights, which is based on proportionality and balancing, is hardly consistent with the idea of a rigid separation between the legislative and judicial functions. In the words of Sachs J in *Prince*:

[L]imitations analysis under section 36 is antithetical to extreme positions which end up setting the irresistible force of democracy and general law enforcement, against the immovable object of constitutionalism and protection of fundamental rights. What it requires is the maximum harmonisation of all the competing considerations. *Ibid*.

These words suggest that s 36 enables an alternative understanding of the separation of powers – one that is grounded not in strict boundaries between the legislature, executive and judiciary (cf *In re: Certification of the Constitution of the Republic of South Africa*, 1996 1996 10 BCLR 1253 (CC) par [108]–[109], [111]–[112] (separation of powers can never be complete, and is not a fixed or rigid constitutional doctrine); *Minister of Health v Treatment Action Campaign (1)* 2002 10 BCLR 1033 (CC) par [98]–[99] (rejecting the idea that courts are not allowed to make orders that have an impact on government policy)) but, rather, in cooperation and dialogue (cf Sachs J's observation in *S v Mhlungu* 1995 7 BCLR 793 (CC) par [129] that constitutional interpretation takes the form of 'a principled judicial dialogue, in the first place between members of this Court, then between our Court and other courts, the legal profession, law schools, Parliament, and, indirectly, with the public at large'). Rather than giving absolute priority to rights over communal interests, or vice versa, s 36, on this understanding, requires judges to construe conflicting interests in a manner that gives them both optimal protection. (This is, of course, strongly reminiscent of the notion of *praktische Konkordanz*, as conceptualised by the German constitutional scholar Konrad Hesse. See K Hesse *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* 20th ed (1999) 28, 142–143, 146.)

- 6 S 36 does not provide a comprehensive answer to difficult institutional questions about the role of the courts vis-à-vis that of the legislature. As Sachs J states:

The search for an appropriate accommodation ... imposes a particularly heavy responsibility on the courts to be sensitive to considerations of institutional competence and the separation of powers. Undue judicial adventurism can be as damaging as excessive judicial timidity (*Prince* par [56]).

- 7 Such an undertaking would be doomed from the start. Among the many difficulties that would present themselves, are the differences between fundamental-rights adjudication in the United States and South Africa (including the fact that the idea of a general limitation clause and a two-stage inquiry is foreign to American constitutional law), and the complexity of Michelman's own thought, which makes it exceedingly difficult to pin him down and enlist him in the service of a particular formula, ideology or dogma.

- 8 See e.g. F Michelman 'Constitutional Authorship, "Solomonic Solutions", and the Unoriginalist Mode of Constitutional Interpretation' in G Bradfield & D van der Merwe (eds) *'Meaning' In Legal Interpretation* (1998) 208 at 226 (describing the political-constitutional consciousness of a country as 'beyond reason', but 'never in all of its parts at once completely inaccessible to reason's prying, critical eye'); FI Michelman *Brennan and*

substantive reasoning, rather than simply deferring to external authority. In his tribute to the late Etienne Mureinik,⁹ he speaks admiringly of ‘Mureinik’s willingness to have society take its chances with practical reasoning’, as reflected in his argument in favour of the inclusion of socio-economic rights in the Bill of Rights. Mureinik, he argues, ‘understood that an open invitation to moral reasoning by judges interpreting the law could carry no guarantees’. However, ‘his idea of human worth was such that he preferred the honest risks of responsible human action to the illusory comforts of self-applying rules’.

Secondly, Michelman’s reflections on the relationship between democratic self-rule and constitutionalism (‘law-rule’) are among the most thoughtful contributions on the topic. I believe that these reflections may help us make sense of the Constitution’s paradoxical commitment to democracy and rights; social justice and individual freedom; an ongoing transformation of the legal and social order and precommitment to constitutional norms – and to use these fault lines and contradictions critically and imaginatively.

II THE SELF, RIGHTS, AND ADJUDICATION

Michelman’s constitutional thought is marked by a sustained engagement with the tensions underlying the liberal legal and political tradition. His reflections on liberalism’s paradoxical commitment to democracy and rights, popular sovereignty and constitutionalism, freedom and equality, individualism and the value of community bear testimony both to his own commitment to individual liberty and plurality, and his discomfort with the abstract individualism, essentialism and legal formalism that are often associated with the liberal tradition. Consider, for instance, his conception of the self. Michelman is clear in his rejection of any form of collectivism, which asserts that the interests of individuals must be subordinated to those of the collective. He believes that each individual’s life is ‘a singular focus of moral concern’.¹⁰ However, he is equally clear that this ‘normative individualism’ need not rest on a conception of the self as unencumbered, self-sufficient or prior to its ends. He writes:

Individuals are what matter in the end. Individuals are also, however, as a matter of fact, socially constituted, enmeshed in various relations and communities, thoughtways and cultures, institutions and practices. Out of these multiple, overlapping formative contexts, individuality forms itself. Individuals, then, depend for their identities and self-understandings on affiliation and commitment, as they depend for justice, security, and certain other conditions of thriving on public institutions of law and government.¹¹

Michelman, it seems, is distrustful of all attempts to define the self in terms of fixed, essential characteristics; to foreclose human possibility in the name of some ‘predetermined human or social essence’.¹² Even though the process through which individual identities are forged, is

Democracy (1999) 54 (given the fact of human plurality and disagreement about normative questions, ‘no one does or finally can know the truth about the foundational conditions of right government. And yet it couldn’t be that truth in this matter is beyond reasoned argument, or just a matter of opinion or desire or power’).

9 F. Michelman ‘The Constitution, Social Rights and Reason: A Tribute to Etienne Mureinik’ (1998) 14 *SAJHR* 499 at 506.

10 Michelman *Brennan and Democracy* (note 8 above) 123.

11 Michelman *Brennan and Democracy* (note 8 above) 133. See also at 66–67 and 123.

12 F. I. Michelman ‘The Supreme Court 1985 Term – Foreword: Traces of Self-Government’ (1986) 100 *Harvard LR* 4 at 28. See generally at 22–23, 28–30. Michelman criticises both the classical-republican conception of the individual as naturally a citizen and the Kantian definition of the self as pure, unconditioned self-direction. These

irreducibly social, that does not mean that individuals need to be locked forever into a ‘limited imaginative and social world’.¹³ For Michelman, the human capacity for self-revision or self-transcendence is something to be treasured. It is, however, not to be taken for granted. It depends, to a significant extent, on the existence of social and political arrangements that value confrontation, debate, and the capacity of individuals and communities to revise their own identities.

Michelman’s affirmation of the moral worth of the individual does not translate into a conception of rights as trumps or rigid boundaries between the individual and the community. For if it is true that individuals are socially constituted, that they ‘depend for their identities and self-understandings on affiliation and commitment’, the idea of rights as abstract, prepolitical entitlements, as a wall-like separation between the individual and the political community becomes problematic. Michelman reconceives rights as ‘a relationship and a social practice’; ‘a form of social cooperation’; ‘an expression of connectedness’.¹⁴ He defends the idea of positive social rights;¹⁵ argues for an alternative conception of constitutional property that is based as much on the need for a redistribution of wealth as on the need to protect existing property rights;¹⁶ and grounds property and privacy¹⁷ not in the need to shield individuals from public power, but in the intimate relationship between these rights and political freedom.

Michelman’s conception of the self and of individual rights is not conducive to the formalist belief in the ability of judges to derive answers to legal questions, in a neutral and objective manner, from the relevant legal materials. If the individual is enmeshed in social relations; if – as Michelman concedes in response to Duncan Kennedy – the presence of others is both a precondition of and a threat to the development of individual autonomy; if – as Michelman asserts with another nod to Kennedy – the contradiction between self-reliance and other-dependence is reflected in contradictory legal rules and principles,¹⁸ it is not possible to decide conflicts between individual and communal interests with reference to some pre-existing bright-line boundary. In deciding these conflicts, judges have to choose between different categorisations of factual situations. They have to interpret and concretise legal norms that are capable of different interpretations and applications. They have to choose between conflicting rules, principles and policies. They have to explain their choice of categorisation; and articulate the moral and political reasoning that led them to choose one interpretation of a legal norm over another.

Michelman regularly stresses the need for judges to choose and to explain, as fully as possible, the reasons for their choices. He rejects the view that judges interpreting a constitution

definitions rest upon the ‘predetermination of human purpose or social role’, and have effects that are ‘exclusionary, hierarchical, and selectively oppressive’: at 29. He is also critical of the liberal-pluralist conception of the self as a rational maximiser of self-interest. See F Michelman ‘Law’s Republic’ (1988) 97 *Yale LJ* 1493 at 1507–1513.

13 Michelman *Brennan and Democracy* (note 8 above) 69.

14 Michelman ‘Justification (and Justifiability) of Law in a Contradictory World’ in JR Pennock & JW Chapman (eds) *Justification in Law, Ethics and Politics* (1986) 71 at 91.

15 Michelman *Brennan and Democracy* (note 8 above) 120–121, 134, 136.

16 F Michelman ‘Possession vs Distribution in the Constitutional Idea of Property’ (1987) 72 *Iowa LR* 13 at 19. See also *First National Bank of SA v Commissioner for the South African Revenue Services* 2002 7 BCLR 702 (CC) par [49]–[50], [52].

17 Michelman ‘Law’s Republic’ (note 12 above) 1535–1536. See also *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) par [116] (Sachs J concurring).

18 See Michelman ‘Justification’ (note 14 above). In that essay, Michelman engages with Duncan Kennedy’s notion of the fundamental contradiction. See D Kennedy ‘The Structure of Blackstone’s Commentaries’ (1979) 28 *Buffalo LR* 205. See also Johan van der Walt’s essay elsewhere in this volume.

should merely follow ‘the meanings put into the constitution by others’.¹⁹ This view presupposes that constitutional provisions are far more determinate than they actually are. It disregards the fact that a constitution, far from resolving all controversial value questions, often deliberately leaves some of these questions open for future resolution.²⁰ In Michelman’s view, it is inevitable that judges’ own judgments of what is right and good will ‘infiltrate’ and ‘colour’ their interpretations of constitutional provisions;²¹ that their decisions will be influenced by their own understanding of the political project of the Constitution.

There is a link between Michelman’s conception of the self and his confidence in the ability of practical reasoning and dialogue to set limits to power.²² Because he sees the self as embedded in particular relations, communities, practices and thoughtways, yet as capable of self-revision, Michelman finds it conceivable that politics may transcend the competitive pursuit of narrow self-interest; that, in the course of deliberation about the common good, citizens may revise their own beliefs, attitudes and perceptions of self-interest. His belief that judges may – and should – become participants in a transformative process of democratic deliberation²³ is equally rooted in this conception of the self. Judges themselves are members of interpretive communities, whose judgments of what is good, right and proper are shaped discursively, and whose reasoning is constrained, *inter alia* – but not determined absolutely – by professional commitments and the background assumptions inherent in legal practice.²⁴ For these reasons, we need not fear that judicial reliance on moral and political considerations will result in completely subjective, arbitrary or idiosyncratic decision-making. Despite the existence of reasonable interpretive disagreement and the absence, in many cases, of a single right answer, judges are constrained by the need to give reasons for their decisions; to appeal to widely shared values in a bid to persuade others (the coordinate branches of government, appellate judges, the legal fraternity, the broader public, etc) of the correctness of their decisions.²⁵

III JUDICIAL DEFERENCE, SELF-APPLYING RULES, AND BALANCING

Michelman’s comments²⁶ on the decision of the United States Supreme Court in *Goldman v Weinberger*²⁷ provides a striking illustration of his commitment to a style of adjudication that is based on practical reasoning rather than the mechanical application of legal rules; that is sensitive to context and the concrete circumstances in which litigants find themselves;

19 Michelman ‘Constitutional Authorship’ (note 8 above) 208.

20 See Michelman ‘Constitutional Authorship’ (note 8 above) 208 at 220–223, where Michelman discusses the Constitutional Court’s confrontation with the interim Constitution’s ‘Solomonic solution’ to the question of the death penalty, and his argument (at 225–227) that ‘Solomonic solutions’ are far less exceptional than is commonly supposed.

21 At 223. See also Michelman ‘Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation’ (1989) 56 *Tennessee LR* 291 at 298 (textual constraints are often ‘not tight enough’ to resolve constitutional issues ‘beyond doubt or dispute. ... Judicial arguments of reason are thus the inescapable supplements to appeals to the political and institutional authority of the Constitution.’)

22 See e.g. Michelman ‘Traces of Self-Government’ (note 12 above) 31–36.

23 See VI below.

24 See KE Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *SAJHR* 146, particularly at 166–172; Botha (2000) 63 *THRHR* 561 (note 2 above) 572–574.

25 See S Winter *A Clearing In the Forest: Law, Life, and Mind* (2001) 309–331.

26 Michelman ‘Traces of Self-Government’ (note 12 above) 5–16, 33–36.

27 475 US 503 (1986).

that resists the bureaucratic impulse to repress social difference in the name of order, uniformity and control; and that acknowledges the responsibility of judges for their decisions, rather than deferring uncritically to external authority. In *Goldman*, a majority of judges rejected a constitutional challenge to an Air Force regulation prohibiting the wearing of headgear while indoors. The applicant, an orthodox Jewish officer who was disciplined for wearing a yarmulke, argued that the application of the regulation violated his right to free exercise of religion. The majority (per Rehnquist J) found that courts owe ‘great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest’,²⁸ and that the regulation in question ‘reasonably and evenhandedly regulates dress in the interest of the military’s perceived need for uniformity’.²⁹

Stevens J wrote a concurring judgment, in which he emphasised the importance of uniform treatment for members of all religious faiths. The regulation, in his view, rested on a ‘neutral, completely objective standard – visibility’.³⁰ Granting an exemption to Goldman on the ground that a yarmulke posed no threat to considerations of ‘functional utility, health and safety’, or to ‘the goal of a polished, professional appearance’,³¹ could result in discrimination against a Sikh or a Rastafarian, whose turban or dreadlocks might not pass the same test. Three judges (Brennan, Blackmun and O’Connor JJ) authored separate dissenting judgments. Although these judgments differ in tone and in the standard of justification they require, they agree that no credible reason was offered to justify a serious infringement of Goldman’s freedom of religion.

In Michelman’s view, the main majority judgment, with its emphasis on the need for judicial deference to military decisions, amounts to an abdication of judicial responsibility. It subordinates the dynamic social process through which a religious community creates its normative universe to vaguely defined institutional considerations; fails to engage with social difference; and surrenders uncritically to ‘what [Robert] Cover called “the violence of administration”’.³²

Michelman is more sympathetic to the stance adopted by Stevens J in his concurring judgment. His judgment is based not on unquestioning deference to military authority, but on a particular understanding of the role of law in the negotiation of social difference. In this view, the safe coexistence of a plurality of communities is possible only on the basis of neutral, objective legal standards. Stevens J views the visibility of religious apparel as such a standard, as it is not partial to any particular religion or world-view and is capable of relatively automatic application. However, as Brennan J points out in his dissenting judgment, the ‘neutrality’ of the visibility standard is largely illusory, as it ‘permits only individuals whose outer garments and grooming are indistinguishable from those of mainstream Christians to fulfil their religious duties’,³³ and thus favours majority over minority religions. As Michelman argues, the appeal to an impartial rule of law contains

some element of flight from responsibility. ... ‘Objective’ legal standards seem to absolve judges of responsibility for the fates of individual parties. ‘Neutral’ legal standards seem to

28 507.

29 510.

30 513.

31 This is the test proposed by Brennan J (519) in his dissenting judgment. See the concurring judgment of Stevens J (512–513) and the dissent of Blackmun J (526–527) for a critique of this test.

32 Michelman ‘Traces of Self-Government’ (note 12 above) 15.

33 *Goldman* note 27 above at 520.

absolve their promulgators – sometimes the very judges who apply them – of responsibility for their contributions to socially unequal or conflictual outcomes.³⁴

In Michelman's view, the dissenting judgment of O'Connor J exemplifies the virtues of a judicial commitment to practical reasoning, dialogue and sensitivity to context. O'Connor J was the only judge in *Goldman* to formulate a general doctrinal standard for free exercise of religion claims in the military context. She held that the government, in denying a free exercise claim, had to show that an 'unusually important' state interest is at stake; and that such interest would be 'substantially harmed' by granting the exemption requested by the individual. She accepted that the need for military discipline and esprit de corps is an 'especially important governmental interest', but found that the government had not presented sufficient proof that an exemption would result in substantial harm to that interest.³⁵

Michelman commends O'Connor J for her choice of a flexible balancing test. By adopting a standard that would require judges to engage in 'contestable evaluations of the concrete interests at stake' in a particular case, she signals her commitment to 'a communicative practice of open and intelligible reason-giving'³⁶ and affirms her responsibility for her decision, rather than hiding behind deference to bureaucratic expertise or supposedly neutral rules. By adopting a test that calls for a careful, contextual, case-by-case analysis, she invites future conversation. By subjecting incursions by the military into freedom of religion to strict scrutiny, she affirms her own understanding of the critical importance of religious freedom to an open, democratic, multicultural society.

These themes are echoed in many of Michelman's other writings. His renunciation of judicial deference to external authority (whether in the form of tradition, legislative intent or bureaucratic expertise) is perhaps best exemplified by his critique of the judgment in *Bowers v Hardwick*,³⁷ in which the Supreme Court upheld a state law criminalising sodomy. Michelman deplores the majority's uncritical reliance on history to justify a suppression of the identity and citizenship of gays. He rejects the backward-looking, authoritarian nature of its stance; the assumption that judicial decisions are legitimate only to the extent that they entail the 'unquestioning and uncreative ... application of the prior word of some socially recognized, extra-judicial authority'.³⁸ This understanding of adjudication tends to downplay the ambiguity of the historical record, or whatever other source of external authority is relied on. It rests upon a shallow conception of democracy that deprives the political community of critical resources of contestation, and thus impairs its capacity for self-revision and regeneration. It results in an abdication of judicial responsibility in the name of a too easy opposition between law and politics.

Michelman's distrust of rigid, categorical distinctions and supposedly self-applying legal rules, and his predisposition to a type of adjudication that is based on practical reasoning and dialogue, is also evident from his critique³⁹ of the decision of Easterbrook J in *American Booksellers Ass'n v Hudnut*,⁴⁰ in which an antipornography ordinance was invalidated. Easterbrook J accepted the validity of the rationale offered for the ordinance by the city council,

34 Michelman 'Traces of Self-Government' (note 12 above) 15.

35 *Goldman* note 27 above at 529–533.

36 Michelman 'Traces of Self-Government' (note 12 above) 34.

37 478 US 186 (1986). See Michelman 'Law's Republic' (note 12 above) 1494–1499, 1532–1537.

38 Michelman 'Law's Republic' (note 12 above) 1499.

39 Michelman 'Pornography Regulation' (note 21 above).

40 771 F 2d 323 (7Cir 1985).

namely that pornography subordinates and silences women. However, he found that pornography is protected speech; that the ordinance discriminated against a particular viewpoint; and that it was therefore an unconstitutional restriction on freedom of speech.

Michelman notes the absence in this judgment of any attempt to compare or balance the social evils consequent upon governmental restrictions on politically charged expression with the subordination and silencing of women consequent upon a decision to leave pornography unregulated. The judgment seems to rely on a categorical rule that directs a court to strike down content-based regulation, without ever comparing the social evils consequent upon repressions by public and private power, respectively. However, the judgment does not explain why such a general rule is to be preferred to case-by-case balancing. It merely asserts that the Constitution forbids content-based regulation. But, argues Michelman, the Constitution does not unambiguously prescribe such a rule. Such a rule cannot 'be found in the Constitution without resorting ... to a supplemental argument of reason'.⁴¹ The judge's reasoning is incomplete to the extent that he fails to provide such an argument.

Of course, the judge relies implicitly on the public-private distinction, as expressed *inter alia* in the state action doctrine. The unspoken premise upon which his judgment is based, seems to be the idea that public power is categorically more to be feared than private power. However, Michelman objects that 'power is real and potentially dangerous'⁴² in both the arenas of state-based lawmaking and market-based private action. A categorical distinction between the two

cannot deliver reliable answers ... [O]ur actual experiences of political, economic, and social life are too messy, too mixed, and too ambiguous to support any such categorical, wholesale answer.⁴³

In the final analysis, the judgment is based on intuitions about the nature of public lawmaking. Michelman shows that the public-private distinction, as evident in Easterbrook J's decision, is rooted in a pessimistic view of public lawmaking; a habit of seeing it as a predominantly strategic process in which social actors use bargaining to maximise their own interests, rather than a deliberative process which is marked by a willingness on the part of participants to reconsider their private beliefs and preferences in the light of reasons referring to the claims of others as well as their own.⁴⁴ And yet, argues Michelman, the notion of a supreme, binding Constitution, which derives its authority from its popular origin, presupposes a belief in the possibility of deliberative politics. It may even be the case that, if Americans were once able to engage in revolutionary, deliberative politics, they may be able to rise to the challenge again. This raises the possibility that the antipornography ordinance may represent the legislators' considered judgment, after careful deliberation, of the relative weight of conflicting constitutional values. Michelman suggests that, in such an event, judicial restraint may be advisable. However, no categorical, self-applying rule presents itself to the judge. 'In order to decide, a judge would have to look. A judge would have to judge.'⁴⁵

41 Michelman 'Pornography Regulation' (note 21 above) 306.

42 At 311.

43 At 313.

44 At 314–318. See also at 293–294; and F Michelman 'Conceptions of Democracy in American Constitutional Argument: Voting Rights' (1989) 41 *Florida LR* 443 at 447–448 on the distinction between strategic and deliberative interaction.

45 Michelman 'Pornography Regulation' (note 21 above) 319.

IV BALANCING: AN AFFIRMATION OF OR ESCAPE FROM JUDICIAL RESPONSIBILITY?

Michelman seems to prefer balancing to a rigid categorisation approach. Balancing, in his view, presents an alternative to the flight from responsibility that is inherent in appeals to absolute distinctions and categorical rules. Because balancing involves a contestable evaluation of interests and requires practical reasoning, a balancing judge is far more likely than a non-balancing judge to recognise that her decision is based on her own situated – and inevitably fallible – judgment, to engage with the concrete social context, and to articulate the moral and political reasons for her decisions. For these reasons, balancing is conducive to dialogue about the relationship between conflicting constitutional values, about questions of political morality, and about the appropriate balance to be struck in subsequent cases.

It is somewhat surprising that Michelman endorses judicial balancing without mentioning any of the objections against balancing, and without referring to the vast academic literature⁴⁶ on the topic. It is often argued that balancing, far from promoting judicial responsibility and democratic dialogue, tends to forestall debate and absolve judges from the responsibility to give reasons for their decisions. Balancing, it is argued, presupposes the existence of a single metric of justice, and thus denies the incommensurability of conflicting constitutional values. Moreover, the balancing judge tends to lose sight of the constitutional text that, after all, contains very little guidance on the relative weight of conflicting constitutional values. Rather than engaging in the hard work of constitutional interpretation, the balancing judge simply declares one constitutional interest to outweigh another. Balancing, in this view, serves as a smokescreen that allows judges to mask controversial value choices behind a supposedly objective evaluation of the relative weight of different legal interests.

It may be that some of the criticisms⁴⁷ levelled against balancing are informed by a desire to ground constitutional adjudication in a neutral legal method, and thus to maintain a more or less strict separation between law and politics.⁴⁸ Insofar as this is the case, Michelman would be quite

46 The following is but a small sample of the literature that engages with the problems associated with balancing: in the United States, M Tushnet 'An Essay on Rights' (1984) 62 *Texas LR* 1363 at 1372–1373; TA Aleinikoff 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale LJ* 943; 'Symposium: When is a Line as Long as a Rock is Heavy? Reconciling Public Values and Individual Rights in Constitutional Adjudication' (1994) 45 *Hastings LJ* 707; in Germany, Hesse (note 5 above) 28, 143; L Blaauw-Wolf 'The "Balancing of Interests" With Reference to the Principle of Proportionality and the Doctrine of *Güterabwägung* – A Comparative Analysis' (1999) 14 *SA Public Law* 178; and in South Africa, S Woolman 'Out of Order? Out of Balance? The Limitation Clause of the Final Constitution' 1997 *SAJHR* 102 at 114–119; and H Botha 'Metaphoric Reasoning and Transformative Constitutionalism – Part 2' 2003 *TSAR* 20–36.

47 Böckenförde's rejection of balancing (see EW Böckenförde 'Grundrechtstheorie und Grundrechtsinterpretation' 1974 *Neue Juristische Wochenschrift* 1529 at 1531 and 1534) goes hand in hand with his conception of fundamental rights as negative, prepolitical liberties and his idea of a strict separation between the legislative and judicial authority. Justice Scalia of the United States Supreme Court, another opponent of judicial balancing, argues that the meaning of a legal rule inheres in the plain meaning of the words used to state the rule, and is clearly distrustful of discretionary or fact-based modes of legal analysis. See A Scalia 'The Rule of Law as a Law of Rules' (1989) 56 *Univ Chicago LR* 1175.

48 Some of the criticism seems to rest upon a too easy opposition between 'interpretivism' and 'non-interpretivism', or the belief that it is possible and desirable to ground legal interpretation in a particular text, without being influenced by 'extratextual' considerations. Michelman responds to these views in his analysis of the Constitutional Court's reasoning in *S v Makwanyane* note 3 above. He writes that, when considering the proportionality test undertaken by the Court, and especially the assignment 'of relative values to various of the rights enumerated in the bill of rights, and of relative weights to retribution and deterrence as considerations in the constitutional theory of punishment – culminating, perhaps, in the remark that "retribution cannot be accorded the

right to insist that the risks of balancing should be preferred to the ‘illusory comforts of self-applying rules’.⁴⁹ However, it would be a mistake to assume that those critical of balancing are by definition legal formalists who prefer the security of supposedly self-applying rules and clear boundaries to the risks of practical reasoning. Some of the objections against balancing seem to be inspired not by an aversion to practical reasoning and the exercise of judgment but, on the contrary, by a concern that the balancing metaphor does more to obfuscate the moral and political reasoning behind a judge’s decision than to clarify it; that the rhetoric of balancing allows judges to persist in the fallacy that legal decisions can be ‘read off’ the relevant legal materials. It is argued that balancing, far from promoting dialogue about important moral and political issues and affirming judicial responsibility, tends to result in a new type of formalism, which is grounded in the scientific language of costs-benefits analysis.⁵⁰

Michelman is likely to concede that some balancing judgments fail to convey the substantive reasoning behind a decision; that judges sometimes invoke the balancing metaphor to lend an air of (scientific) objectivity and neutrality to their judgments. However, he is also likely to point out that that is not the sense in which he used the term ‘balancing’ in his discussion of the *Goldman* and *American Booksellers* decisions. What he endorsed there was not the type of scientific balancing in which a judge ‘reads’ the result off a machine, but rather a form of practical reasoning that involves proportionality analysis and, inevitably, a contestable comparison of conflicting goods. For instance, the balancing judgment of O’Connor J in *Goldman* did not amount to a mere declaration that one interest outweighed another, nor did it employ the ‘scientific’ language of costs-benefits analysis to make the judgment appear inevitable. It did, rather, rest upon the articulation of a standard for measuring the constitutionality of alleged breaches of freedom of religion in the military context – a standard which reflects the highest regard for religious diversity, and requires the state to meet a particularly heavy burden in justifying incursions into religious liberty. This standard clearly rests upon a particular substantive vision of freedom of religion. It requires judges to guard jealously over religious freedom and the conditions of religious plurality, rather than attempting to calibrate the scales of justice in a detached and neutral manner.

Of course, different judges may characterise the interests at stake differently and attach different weights to these interests. What distinguishes a good balancing judgment from a bad one is, however, less a function of the ‘correct’ characterisation or the ‘accuracy’ of the weights attached to conflicting interests, than of the extent to which the judgment gives concrete meaning to constitutional norms, engages those affected by it, spells out the reasons for the decision, and articulates the moral and political reasoning that went into it.

Michelman is clear that the balance struck by a judge will be influenced, to a significant extent, by choices of narrative and context.⁵¹ What distinguished the judgment of O’Connor J in *Goldman* from those of her colleagues was not merely her choice for a particular standard of

same weight under our Constitution as the rights to life and dignity, which are the most important of all the rights under Chapter Three” – you may come to believe, not that the argument has taken leave of the text (for that would not be true) but that judicially held beliefs about what makes a constitution a good one, or a good one for South Africa, have inevitably infiltrated and coloured the text that is undergoing interpretation’: Michelman ‘Constitutional Authorship’ (note 8 above) 222–223.

49 Michelman ‘Tribute to Etienne Mureinik’ (note 9 above) 506.

50 Aleinikoff (1987) 96 *Yale LJ* 943 (note 46 above) 993 writes: ‘Scientifically styled opinions, written to answer charges of subjectivity, make us spectators as the Court places the various interests on the scales. The weighing mechanism remains a mystery, and the result is simply read off the machine. Scientific balancing decisions are neither opinions nor arguments that can engage us; they are demonstrations.’

51 Cf Woolman’s argument for a story-telling approach to limitation analysis: Woolman (note 46 above) 119–133.

review, but also the way in which she put the various threads of the narrative together. (In fact, her choice for balancing and a standard of strict scrutiny seems to have been determined by her choice of narrative.) Michelman writes:

As narrator resuming in media res a story of many threads – ‘this Court’s precedents’ – it is she who decides which threads to pick up, where, in what combination. The subplot she chooses is that of the social conflict of religion and regulation. To see the commitment in that choice, one need only compare it with Justice Rehnquist’s for the Court. His subplot – no less fairly available than hers in the history – is that of separation of powers, of the articulation of government into agencies related by status. These narrative choices express world views: in her subplot, the setting is society, the protagonists are troubled persons, and the agon is social difference. In his, the setting is the state, the protagonists are abstract authorities, and the agon is institutional deference.⁵²

V PROPORTIONALITY ANALYSIS WITHOUT BALANCING?

Many of the critics of a balancing approach insist that we are not faced with a stark choice between the rigidity of appeals to absolute distinctions and categorical rules, on the one hand, and what they see as the unprincipled nature of balancing, on the other. For instance, some scholars argue for a form of proportionality analysis in which the role of balancing is minimised. Stuart Woolman⁵³ argues that a comparison of the burdens imposed by a fundamental-rights limitation and the benefits said to flow from it, should be undertaken, if at all, only at the end of the limitation inquiry, after factors such as the purpose of the limitation, the relation between the limitation and its purpose, and the availability of less restrictive means have been considered.⁵⁴ In a similar vein, Canadian author David Beatty⁵⁵ argues that courts should focus mainly on the questions whether the means used by the government to translate its objectives into law, are rational and do not interfere with individual rights and freedoms more than is necessary. They should, however, show deference to the legislature’s evaluation

52 Michelman ‘Traces of Self-Government’ (note 12 above) 35.

53 Woolman (note 46 above) 111.

54 Woolman does not argue for the complete elimination of balancing or costs-benefits analysis from the limitation inquiry. Rather, he argues that it will often be unnecessary to weigh up the costs imposed by a limitation against the benefits said to be flowing from it. For instance, where it has been found that a limitation does not serve a legitimate government objective, or that it is not rationally related to the objective it seeks to achieve, or that the objective could be achieved by less restrictive means, there is no need to engage in a comparison of costs and benefits. Woolman recognises that there may be limitations which will pass all the other tests, but fail the balancing test. However, he argues that it will be ‘relatively rare’ for a measure to pass the less restrictive means test, but fail the balancing test. The reason for this is that ‘if a restrictive measure is not as narrowly tailored as possible, then it is very likely to impose greater costs on the person affected than would a more narrowly tailored restriction’: S Woolman ‘Riding the Push-Me Pull-You: Constructing a Test that Reconciles the Conflicting Interests Which Animate the Limitation Clause’ (1994) 10 *SAJHR* 60 at 89 n 80. While I agree with Woolman that it may sometimes be possible to avoid balancing, I shall argue that the less restrictive means test will not always yield clear, unambiguous answers. The need to inquire into the extent of a limitation and to compare the effects of the limitation with the benefits deriving from it, will therefore present itself not only in cases in which the limitation passes all the other tests, but also in cases where less restrictive means have been identified that would, however, be less effective than the ones chosen, or impose significant additional costs on the state.

55 Beatty (note 2 above) 24–26; and *Talking Heads and the Supremes: The Canadian Production of the Constitutional Review* (1990) 111–112, 114–118.

of the importance of particular government policies, as measured against the adverse impact they may have on individuals. Such an approach is said to institute a constitutional dialogue between the judiciary and legislature over the least intrusive means to attain legislative ends, while leaving it to the legislature to do the balancing.⁵⁶

How would Michelman respond to these attempts to take balancing out of proportionality analysis; to come up with a limitation test that is sensitive to context, yet less messy than balancing and better able to structure a conversation between the legislature and judiciary? I suppose he would be both sympathetic to and critical of such an endeavour. He would approve of the broad aim of developing a mode of analysis that is more nuanced than a crude weighing of interests; that would allow judges to explain, as fully as possible, the reasons for their decisions. However, he may be suspicious of the idea that that could be achieved through a formal test in which balancing plays almost no part.⁵⁷

Advocates of a limitation test in which the role of balancing is minimised tend to place the 'less restrictive means' requirement at the heart of limitation analysis.⁵⁸ In terms of this requirement, the state should not impose restrictions on fundamental rights if the same purpose could be achieved through measures that are less burdensome. It would, however, be a mistake to assume that the less restrictive means test can be completely severed from balancing. A resourceful lawyer will often be able to think of less restrictive means to achieve a given purpose. However, in many cases, such alternative measures will be less effective than the ones chosen, or will impose significant additional costs on the state.⁵⁹ To avoid balancing, one would have to reduce the less restrictive means requirement to a rigid rule, which would have to provide either that the least restrictive means should always be used, regardless of any additional costs imposed by it, or that the state should be expected to opt for less restrictive means only if such means would not impose significant additional costs. The first rule seems to be too stringent – it would require the state to opt for less restrictive means even where the fundamental-rights infringement has been relatively minor, where the purpose of the limitation is fundamentally important, and where substantial additional costs (in terms of effectiveness, administrability and/or the allocation of resources) would be imposed. The second rule, on the

56 Hogg and Bushell (note 2 above).

57 Woolman has pointed out in conversation that it would be a mistake to assume that Michelman's apparent endorsement of balancing in the USA implies that he would favour balancing within the South African context. Michelman's comments on balancing within the American context should be seen against the background of the absence of a limitation clause in the USA, which means that rights analysis and limitation analysis are combined in a single inquiry, with judges relying sometimes on categorical rules, and sometimes on balancing to decide the constitutionality of alleged rights violations. While I appreciate that Michelman's comments on balancing should not be transplanted uncritically to the South African context, I believe that there are good reasons to think that he may have reservations about a form of proportionality analysis in which balancing plays little or no role. These are, first, the indeterminacy of the less restrictive means test in cases in which alternate measures would be less effective than the ones chosen, or would impose significant additional costs (discussed below); and second, Michelman's views on the relationship between constitutionalism and democracy (see section VI below).

58 Beatty *Talking Heads* (note 55 above) 115 argues that the principle of alternate means, rather than the balancing principle, should 'organize most "constitutional conversations"'. He states that 'in virtually every judgment in which the [Canadian Supreme Court], or one of its members, proposed to strike down some aspect of a law as being unconstitutional, it was based on a finding that the law impinged upon the rights and freedoms of those it affected more than was necessary to accomplish the legislators' or executive's objectives'. See also Hogg and Bushell (note 2 above) 85.

59 The point is made persuasively by JH Ely 'Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis' (1975) 88 *Harvard LR* 1482 at 1485–1487.

other hand, would substantially water down limitation analysis, and would reduce the less restrictive means test to near insignificance.

Barring these two rules, a judge would have to engage in some kind of comparison of the severity of a fundamental-rights limitation and the importance of its purpose. This point is effectively illustrated by the debate between the majority and the minority in *Prince v President of the Law Society of the Cape of Good Hope*.⁶⁰ In *Prince*, the Constitutional Court considered a challenge to the constitutionality of the prohibition of the use and possession of cannabis, on the ground that the relevant legislation did not provide an exemption for the use or possession of cannabis by Rastafari for bona fide religious purposes. The majority of the Court (five out of nine judges) held that the prohibition limited the religious freedom of Rastafari, but that such limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In a joint judgment, Chaskalson CJ, Ackermann and Kriegler JJ emphasised that South Africa has an international obligation to curtail the trade in cannabis. They found that it would be difficult to determine whether a person found in possession of cannabis is a bona fide Rastafarian, or to distinguish objectively between the use of cannabis for religious or recreational purposes. For these and other reasons, the creation of an exemption for the use of cannabis for religious purposes would substantially impair the state's ability to enforce drugs legislation.

Ngcobo J found in his dissenting judgment (which was concurred by three judges) that the limitation was unreasonable and therefore invalid. He recognised that the limitation served an important social purpose (preventing the abuse of dependence-producing drugs and trafficking in these drugs), but found that the achievement of such purpose did not require a complete ban on all uses of cannabis. Put differently, the limitation is overbroad; it targets uses that pose no risk of harm and that can effectively be regulated and subjected to government control.

It is striking that both the majority and the minority in *Prince* use the language of balancing and proportionality and, in so doing, stress the need for an approach that is sensitive to context. The majority judgment emphasises the need for 'a nuanced and context-sensitive form of balancing',⁶¹ while the minority describes limitation analysis in terms of 'the weighing up of competing values and ultimately an assessment based on proportionality',⁶² and warn that

the weighing of the respective interests at stake does not take place on weightless scales of pure logic pivoted on a friction-free fulcrum of abstract rationality. The balancing always has to be done in the context of a lived and experienced historical, sociological and imaginative reality.⁶³

However, the majority and the minority part ways on the question whether less restrictive means could be used to achieve the limitation's purpose. The minority insists that the limitation is overbroad, as it targets harmful as well as relatively harmless uses of cannabis (such as bathing in it or burning it as incense). It argues that it is possible to grant an exemption that would not undermine the purpose of the limitation. For instance, an exemption could be

60 2002 3 BCLR 231 (CC). See note 4 above. Cf also the debate between the majority and minority in *S v Manamela* note 4 above, particularly at par [34], [43], [49] and [94]–[97].

61 Par [128].

62 Par [45] (per Ngcobo J).

63 Par [151] (per Sachs J).

effectively administered by means of a permit system.⁶⁴ The majority, on the other hand, argues that a permit system would be difficult to enforce, would impose additional financial and administrative burdens on the state, and would fail to protect Rastafari against the harm caused by the use of cannabis. In its view, there were no less restrictive means to achieve the limitation's purpose, as an exemption would substantially impair the state's ability to enforce its drug legislation.⁶⁵

This disagreement reflects other differences. The first difference relates to the analysis of the extent of the limitation. The majority and the minority seem to agree that the right to freedom of religion is an important right, and that the legislation in question places a substantial limitation on the religious practices of Rastafari. However, the minority places far greater emphasis on the severity of the impact of the limitation. It emphasises the outsider status of Rastafari, their lack of political bargaining power,⁶⁶ and the fact that a blanket ban entrenches the social stigma that attaches to them by treating them as criminals and drug addicts. Ngcobo J writes that the prohibition of the use of cannabis for religious purposes

degrades and devalues the followers of the Rastafari religion in our society... It strikes at the very core of their human dignity. It says that their religion is not worthy of protection.⁶⁷

The effect of this emphasis on the vulnerability of the affected group and the serious nature of the disadvantage inflicted upon them, is that the minority holds the state to a higher standard of justification than would otherwise have been the case, as it is inherent in the notion of balancing that the more serious the impact of a fundamental-rights limitation, the more compelling the state's justification needs to be.⁶⁸

Secondly, the majority and the minority locate the case within different social and historical contexts. The majority seems to be primarily concerned with the law-enforcement context, while the minority stresses other contexts in addition to that of enforcing the ban on drugs. For instance, Sachs J notes that the Rastafari religion can be traced to 'the experience of a vast African diaspora', and that the use of cannabis is seen as 're-establishing a ruptured Afro-centred mystical communion with the universe'.⁶⁹ He also emphasises the rootedness of cannabis in South African social practice. The majority, by contrast, regards that history as irrelevant to the constitutionality of the legislation in question.⁷⁰

It would seem, then, that the disagreement between the majority and the minority in *Prince* does not centre on the 'technical' question whether less restrictive means were, in fact, available. Rather, it centres around questions of disadvantage and moral citizenship, of the contexts which are (most) relevant in deciding conflicts between individual rights and state

64 Par [65]–[70]. Sachs J also suggested the possibility of the decriminalisation of the use of cannabis for sacramental purposes. See par [165]–[169].

65 Par [129]–[142].

66 See par [157]–[161] (per Sachs J).

67 Par [51].

68 See e.g. *S v Manamela* note 4 above par [32]; *Jordan v S* 2002 11 BCLR 1117 (CC) par [29], [86], [94]. The Constitutional Court insists that its recognition that certain limitations require a higher standard of justification than others, does not mean that it follows the United States Supreme Court in employing different levels of scrutiny. See *Prince* note 4 above par [128].

69 Par [152].

70 Par [105].

interests, of the lengths to which the state should be required to go in accommodating marginalised minorities.⁷¹

VI CONSTITUTIONALISM AND THE (IM)POSSIBILITY OF SELF-GOVERNMENT

The above analysis suggests that it is not that easy to dispense with balancing; that seemingly neutral questions such as the availability of less restrictive means can often not be answered without resort to a comparison of the various interests at stake. It also suggests that the answers provided to these questions will invariably depend on the judge's perspective; her choice of narrative and context.

To some, this may confirm the dangers of undue judicial subjectivity; the need for judges to defer to legislative choices. In this view, balancing – the choice between incommensurable goods – is essentially a legislative function. Judges should refrain from second-guessing the way elected legislatures have decided to balance conflicting interests. Michelman, on the other hand, would resist the conclusion that we are faced with a stark choice between deference and judicial usurpation of legislative power. He would, rather, argue that we should stop clinging to the (unworkable) idea of a neat division of functions between the legislature and judiciary; that democracy is better served by judges who are not overly cautious of overstepping the line between the legislative and judicial functions, but are willing to engage in practical reasoning and to take responsibility for their decisions. He may go even further by stating that, far from merely giving effect to the meanings put into the constitution by a constitutional assembly, judges should take responsibility for becoming co-founders of the constitutional order.⁷²

How might judges who assume the function of constitutional framers, promote democracy? Michelman suggests that constitutional litigation is a form of political action; that courts are 'a site of a democratically legitimating public participatory process ... for contesting, reconsidering, and revising the rules of justice'.⁷³ Contrary to the traditional picture of the judge who is unmoved by social strife and controversy and who decides cases neutrally and dispassionately, Michelman portrays Justice Brennan, whose career, in his view, exemplifies the virtues of practical reasoning and responsible judicial action, as a judge who was 'responsive to the shifting controversies of social life that give concrete meaning to legal issues'.⁷⁴ Responsible judicial action presupposes a readiness to reconsider current constitutional doctrine in the light of new experiences and controversies; to revise the narratives through which a legal community's history and future are bound together; to extend the bounds of the political community to those hitherto excluded from meaningful participation in public life.

71 Cf the observation of Sachs J that the real difference between the majority and the minority judgments is that the minority requires the state to 'walk the extra mile' (par [149]).

72 Michelman *Brennan and Democracy* (note 8 above) writes that a judge who cares about democracy, may have to 'take responsibility for becoming a national founder, basic law-giver, and cultural prophet all rolled up in one' (at 51); and that '[a] minor national refounding occurs with every judicial resolution of a reasonably contested question of constitutional meaning' (at 52). See also at 138 (describing Justice Brennan as a framer).

73 At 74.

74 At 72.

Such a revision of legal doctrine and normative histories (or ‘normative tinkering’ as Michelman also refers to it)⁷⁵ is made possible by legal indeterminacy, that is the susceptibility of legal materials to divergent interpretations. Often, we are unable to see any plausible alternatives to the dominant interpretation, in which case we regard it as necessitated by the relevant legal materials. However, we may become conscious of other interpretive possibilities as a result of the struggles of marginalised social groups who contest the ‘naturalness’ and ‘inevitability’ of received understandings and common-sense assumptions, and expose the disjuncture between constitutional ideals such as autonomy and equality, on the one hand, and their own experiences of disadvantage and exclusion, on the other. It is thus as a result of civic action that we become aware of the latent possibilities that are hidden away in our normative materials. It is through a confrontation with the marginalised other that judges are enabled to revise their own understandings of a community’s normative history; to exploit the fault lines and fissures of the legal order; to reinterpret or overrule a previous line of precedent.⁷⁶

Constitutional review can thus contribute to democracy by resisting attempts by legislative majorities and bureaucracies to force minority groups to conform to the mores of the dominant culture; to drown out the distinctiveness of their voice:

The Court helps protect the republican state – that is, the citizens politically engaged – from lapsing into a politics of self-denial. It challenges ‘the people’s’ self-enclosing tendency to assume their own moral completion as they now are and thus to deny to themselves the plurality on which their capacity for transformative self-renewal depends.⁷⁷

Clearly, Michelman is not concerned here primarily with democracy conceived as a protective device against the abuse of government power, or as a bargaining process among multiple social groups. He draws upon a richer conception of democracy – one in which democratic participation has constitutive, rather than merely instrumental value; in which political freedom is considered an end in itself; in which the political choices that are most deserving of being called ‘democratic’ are those that are the outcome of an inclusive, truly deliberative political process characterised by an attitude of openness to ethical persuasion. In short, Michelman invokes the language of civic republicanism, with its emphasis on public autonomy, self-government and political dialogue.⁷⁸ He emphasises the dependence of political freedom upon the capacity of political communities for self-renewal and self-renovation, and links that capacity to the ability of marginalised groups to make themselves heard.

Michelman’s turn to civic republicanism results in a rich understanding of democracy and a thoughtful account of the relation between constitutionalism and democracy. However, it is also fraught with difficulties. For instance, it does not fully explain why judges should be entrusted with the protection of social plurality. It fails to come to terms with the inherent conservatism of judges; the possibility that their social background and legal training may make them unresponsive to shifting social controversies and unsympathetic to the call of

75 See Michelman ‘Law’s Republic’ (note 12 above) 1495.

76 At 1528–1530.

77 At 1532.

78 Michelman is critical of certain elements of the republican tradition. However, he argues that it is possible to sever the good from the bad; to revive the republican concern with deliberation and political freedom, without clinging to solidaristic notions of consensus or an objectively discernible common good. Republicanism, on his reconstruction, need not deny the plurality of values characterising modern societies, or negate the existence of reasonable disagreement on a variety of issues.

marginalised others. It does not explain how people in modern societies can be self-governing in any meaningful sense of the word. It fails to resolve the countermajoritarian dilemma. It is, however, important to view Michelman's turn to civic republicanism in the proper perspective. Michelman does not invoke the republican notion of self-government in an attempt to provide a comprehensive justification of American constitutional law, or to resolve the contradiction between democracy and rights. His claim is not that the American Constitution is a republican document through and through, but rather that elements of the republican tradition have survived and are still available as 'a counter-ideology'; an alternative normative political vision; a 'visionary "opposite"'; a basis for 'constructive imagination'; 'a framework for interpretive debate and a premise for "deviationist doctrine"'.⁷⁹

Moreover, Michelman does not argue that the American people are actually self-governing. In one of his essays, he locates the self-governing dialogic community of civic republicanism in the courts. The courts, particularly the Supreme Court, exemplify the possibility of a dialogic community, and thus represent the possibility of positive freedom to the rest of the nation. Of course, this is a particularly unsatisfactory answer to the problem of legitimacy.⁸⁰ The positive freedom of a small judicial elite can hardly legitimate the authority of decisions affecting the lives of citizens who are standing outside that community; who may experience the outcomes of the judges' deliberations as external restraints on their own freedom.

However, reminds us of our own missing dialogue and self-government.⁸¹ It also reminds us of the possibility Michelman uses the ideal of self-government not as a legitimating device, but rather as a basis for constructive imagination. A judicial commitment to dialogue and practical reasoning of more participatory forms of politics. In the final analysis, the judiciary 'appears not as representative of the People's declared will but as representation and trace of the People's absent self-government'.⁸²

Of course, this does not change the fact that judicial review is a countermajoritarian institution; that judges have the power to invalidate laws passed by democratically elected legislative assemblies. However, Michelman does not seek to resolve the countermajoritarian dilemma. In fact, he seems to believe that no perfect reconciliation of democracy and constitutionalism is possible; that no method of constitutional interpretation and no amount of judicial deference to legislative decisions can resolve the paradox of constitutional democracy.⁸³ Rather than attempting to resolve it, we should teach ourselves to see our 'constitutional democratic practices as, at their best, sisyphian attempts to approximate unsatisfiable ideals of democracy and self-government under law'.⁸⁴

79 Michelman 'Traces of Self-Government' (note 12 above) 17–18.

80 See P Kahn *Legitimacy and History: Self-Government in American Constitutional Theory* (1992) 179–184 for a discussion and critique of the way in which Michelman locates the self-governing community of republican theory in the courts. See also Botha (2000) 63 *THRHR* 561 (note 2 above) 571–572 on the impossibility of locating republican self-government within actual institutions.

81 Michelman 'Traces of Self-Government' (note 12 above) 73.

82 At 65.

83 Michelman argues that Bickel's phrase 'countermajoritarian difficulty' is a euphemism which lets us off the hook too easily; that it may be better to call it a paradox, rather than a mere difficulty: Michelman *Brennan and Democracy* (note 8 above) 7. See also at 32; J van der Walt & H Botha 'Democracy and Rights in South Africa: Beyond a Constitutional Culture of Justification' (2000) 7 *Constellations* 341 at 350; Botha (2000) 63 *THRHR* 561 (note 2 above) 581.

84 Michelman *Brennan and Democracy* (note 8 above) 8.

VII CONCLUDING REMARKS

In this essay, I explored some of the implications of Frank Michelman's constitutional and democratic theory for limitation analysis. I considered his reflections on balancing as a form of practical reasoning, and argued that, despite the very real problems associated with balancing, it is difficult to see how balancing could be eliminated from limitation analysis under section 36 of the Constitution, without reducing limitation analysis to a rigid and mechanistic inquiry. My analysis suggests that, even though there are cases in which there is no need to compare the importance and effects of a limitation (for example when the limitation does not serve a legitimate purpose, or when the same purpose can clearly be achieved by less restrictive means), it will often be the case that tests such as the less restrictive means test will not yield a clear and unambiguous answer, in which case the court will either have to resort to a rigid rule or engage in balancing.

Moreover, the idea that judicial review can be made consonant with democracy by leaving balancing to the legislature, presupposes the possibility of a neat division of work among the legislature and judiciary; a more or less perfect reconciliation of constitutionalism and democracy. Michelman's writings suggest that no such reconciliation is to be had; that the contradiction between democracy and rights is constitutive of constitutional democracies and incapable of resolution.

Perhaps my conclusion that balancing is an indispensable part of limitation analysis is due to a lack of imagination.⁸⁵ Perhaps it may lull us into a state of complacency, safe in the 'knowledge' that judges can continue doing what they are used to do. However, I trust that it will have the opposite effect. There is nothing in my argument that suggests that we can safely dismiss academic critiques of balancing, or that judges are somehow able to reduce conflicting social goods to a single measure of value. My point is rather that judges have nowhere to hide; that there is no escape from the need to make contestable evaluations of and comparisons between the purposes and effects of fundamental-rights limitations. Such evaluations are necessarily contestable in the light of the reality of the interpretive pluralism and reasonable disagreement over social issues that characterise modern societies.⁸⁶ However, it does not follow that they are arbitrary expressions of a judge's own preferences, or that they are 'beyond reasoned argument, or just a matter of opinion or desire or power'.⁸⁷

The contestability of these evaluations imposes a particularly heavy obligation on judges to explain the reasons for their decisions; to treat the parties before them as citizens who must be paid the respect of sincere engagement with their views. In the absence of a single metric of justice, judges must take responsibility for their decisions; they must articulate the moral and political reasoning that supplements and informs their understanding of the Constitution. In the absence of 'weightless scales of pure logic pivoted on a friction-free fulcrum of abstract rationality', they have to engage with the context of 'a lived and experienced historical, sociological and imaginative reality';⁸⁸ they have to account for their choices of narrative and

85 See Aleinikoff (1987) 96 *Yale LJ* 943 (note 46 above). But see also H Botha 'Metaphoric Reasoning and Transformative Constitutionalism' 2002 *TSAR* 612; 2003 *TSAR* 20–36 on the possibility of the reflective and imaginative use and reinterpretation of conventional metaphors like the balancing metaphor.

86 See Michelman 'Postmodernism, Proceduralism, and Constitutional Justice: A Comment on Van der Walt and Botha' (2002) 9 *Constellations* 246.

87 Michelman *Brennan and Democracy* (note 8 above) 54.

88 *Prince* note 4 above par [151] (per Sachs J).

context. In the absence of a theory that is capable of resolving the countermajoritarian paradox, the dividing line between individual freedom and legitimate state power, or between the legislative and judicial functions, remains a matter of argument, persuasion and justification, which continues to arise in new contexts and which can never be settled once and for all.

Constitutional review reminds us of the failures of the democratic process; the existence of reasonable disagreement over vital social issues; the reality of social dissent; the impossibility of a perfect reconciliation of conflicting social interests. At the same time, however, responsible judicial action holds open the possibility of more truly deliberative and participatory forms of politics; of forms of social interaction that are characterised by respect for alterity and a willingness to reconsider one's own beliefs and perceptions of self-interest; of a dialogical transformation of individual and communal identities. A commitment on the part of judges to dialogue and practical reasoning, together with a readiness to listen to voices from the margins, may help us keep the elusive ideal of self-government alive, and remind us of the transformative possibilities that are hidden away in our normative materials.

DANIE BRAND

THE PROCEDURALISATION OF SOUTH AFRICAN SOCIO-ECONOMIC RIGHTS JURISPRUDENCE, OR ‘WHAT ARE SOCIO-ECONOMIC RIGHTS FOR?’¹

I INTRODUCTION

Whenever I read the South African Constitutional Court’s three decisions on constitutional socio-economic rights (*Soobramoney v Minister of Health, KwaZulu-Natal*,² *Government of the Republic of South Africa v Grootboom*,³ and *Minister of Health v Treatment Action Campaign*),⁴ I experience a vague sense of disappointment, despite the ground-breaking

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- 1 My thanks to David Bilchitz, Henk Botha, Iain Currie, Jonathan Klaaren, Sandra Liebenberg, Theunis Roux, André van der Walt, Johan van der Walt, Karin van Marle and Stuart Woolman for reading drafts of this essay and providing me with invaluable comments and suggestions. The inevitable mistakes remain my own. Finally, my thanks to Frank Michelman, whose work has always inspired me and gave rise to much of this essay.
 - 2 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765, 1997 (12) BCLR 1696 (CC) (hereinafter *Soobramoney*). For accounts and analyses of this case, see P Alston & C Scott ‘Adjudicating Constitutional Priorities in a Transnational Context: A Comment On *Soobramoney*’s Legacy and *Grootboom*’s Promise’ (2000) 16 *SAJHR* 206; FI Michelman ‘The Constitution, Social Rights and Reason: A Tribute to Etienne Mureinik’ (1998) 14 *SAJHR* 499; D Moellendorf ‘Reasoning about Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims’ (1998) 14 *SAJHR* 327; and AJ van der Walt ‘Sosiale Geregtigheid, Prosedurele Billikheid, en Eiendom: Alternatiewe Perspektiewe op Grondwetlike Waarborge (Deel Een)’ (2002) 13 *Stell LR* 59 (hereinafter Van der Walt ‘Sosiale Geregtigheid’) at 77-79.
 - 3 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46, 2000 (11) BCLR 1169 (CC) (hereinafter *Grootboom*). For accounts and analyses of this case, see D Bilchitz ‘Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance’ (2002) 119 *SALJ* 484 (hereinafter Bilchitz ‘Minimum Core’); P de Vos ‘*Grootboom*, The Right of Access to Housing and Substantive Equality as Contextual Fairness’ (2001) 17 *SAJHR* 258 (hereinafter De Vos ‘*Grootboom*’); S Liebenberg ‘The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa’ (2001) 17 *SAJHR* 232 (hereinafter Liebenberg ‘Implications of *Grootboom*’); K Pillay ‘Implementing *Grootboom*: Supervision Needed’ (2002) 3:1 *Economic and Social Rights Rev* 13 (available at <http://communitylawcentre.org.za/ser/esr2002>); T Roux ‘Understanding *Grootboom* – A Response to Cass R Sunstein’ (2002) 12:2 *Constitutional Forum* 41 (hereinafter Roux ‘Understanding *Grootboom*’); J Sloth-Nielsen ‘The Child’s Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*’ (2001) 17 *SAJHR* 210; Cass R Sunstein ‘Social and Economic Rights? Lessons from South Africa’ (2001) 11 *Constitutional Forum* 123; AJ van der Walt ‘Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State’ (2001) 118 *SALJ* 258 (hereinafter Van der Walt ‘Dancing’) at 305 – 310; ‘Tentative Urgency: Sensitivity for the Paradoxes of Stability and Change in Social Transformation Decisions of the Constitutional Court’ (2001) 16 *SAPR/PL* 1 (hereinafter Van der Walt ‘Tentative Urgency’) at 9-11; ‘Sosiale Geregtigheid’ (note 2 above) at 79-82.
 - 4 *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721, 2002 (10) BCLR 1033 (CC) (hereinafter *TAC*). For accounts and analyses of this case, see K Hopkins ‘Shattering the Divide – When Judges Go too Far’ (2002) March *De Rebus* 22; D Bilchitz ‘Rights, Resources and Reasonableness: Laying the Foundations for Future Socio-Economic Rights Jurisprudence’ (2003) 19 *SAJHR* 1 (hereinafter Bilchitz ‘Rights’); H Klug ‘Access to

and unprecedented nature of particularly the last two cases. I have tried to articulate this disappointment, but to little avail. That is, until I recently reread some of the earlier works of Frank Michelman. In a trio of articles published in the late 1960s and during the 1970s⁵ Michelman makes a surprising⁶ case for the existence in American law of constitutional rights ‘to make provision for certain basic ingredients of individual welfare, such as food, shelter, health care and education’⁷ – i.e. welfare rights, or known as socio-economic rights in South Africa.⁸ Based on a series of equal protection decisions,⁹ as well as a number of due process decisions,¹⁰ Michelman first argues that the constitutional welfare rights he proposes have in fact implicitly been recognised by the American Supreme Court.¹¹ He furthermore suggests a

Health Care: Judging Implementation in the Context of Aids: *Treatment Action Campaign v Minister of Health* TPD 21182/2001; unreported’ (2002) 18 *SAJHR* 114.

- 5 FI Michelman ‘The Supreme Court, 1968 Term – Foreword: On Protecting the Poor Through the Fourteenth Amendment’ (1969) 83 *Harvard LR* 7 (hereinafter Michelman ‘On Protecting the Poor’); ‘In Pursuit of Constitutional Welfare Rights: One View of Rawls’ Theory of Justice’ (1973) 121 *U Pa L Rev* 962 (hereinafter Michelman ‘Rawls’ Theory of Justice’); and ‘Welfare Rights in a Constitutional Democracy’ (1979) 3 *Washington Univ LQ* 659 (hereinafter Michelman ‘Welfare Rights’). See also Michelman ‘Formal and Associational Aims in Procedural Due Process’ in JR Pennock & JW Chapman (eds) *Due Process (Nomos XVII)* (1977) 126; and ‘States’ Rights and States’ Roles: Permutations of “Sovereignty” in *National League of Cities v Usery*’ (1977) 86 *Yale LJ* 1165.
- 6 It certainly surprised many American commentators: Michelman notes the ‘skeptical, critical, and even derisive’ reaction to his suggestions (Michelman ‘Welfare Rights’ (note 7 above) at 659). See R Bork ‘The Impossibility of Finding Welfare Rights in the Constitution’ (1979) *Washington Univ LQ* 695 and DP Currie ‘Positive and Negative Constitutional Rights’ (1986) 53 *Univ of Chicago LR* 864 for expositions of the traditional view, contrary to Michelman’s. It is pleasantly startling to a foreign observer like me, whose intuitive understanding of American constitutional law is that it is the last place one would expect to find claims for the existence of constitutional rights to minimum welfare.
- 7 Michelman ‘Welfare Rights’ (note 7 above) at 659.
- 8 I use the term *socio-economic rights* to refer to constitutional rights to conditions for material welfare. In the South African Constitution these are the rights to have equitable access to land (s 25(5)), and access to adequate housing (s 26), health care services, sufficient food and water, social security and social assistance (s 27), and education (s 29). All of these, except the rights to access to land and to education, are in addition guaranteed on behalf of children (s 28(1)(c)) and detained persons (s 35(2)(e)). This loosely correlates with Michelman’s term *constitutional welfare rights*. He lists the rights to food, shelter, health care and education ‘... (or whatever) ...’ as examples (Michelman ‘Welfare Rights’ (note 7 above) at 659 and 660). Mostly the terms are synonymous. Where my use of the term socio-economic rights might differ from Michelman’s ‘welfare rights’ is not in the object of the right, but the standard or degree of entitlement to that object. Michelman seems to be clear that his ‘welfare rights’ refer only to the *basic* level of resources required for a *basic* level of individual welfare: he speaks of ‘minimum welfare’ and ‘minimum protection against economic hazard’ (Michelman ‘On Protecting the Poor’ (note 7 above) at 9 and 13). The socio-economic rights in the South African Constitution also refer to basic levels of resources to achieve basic welfare, but then seem to go further, to an as yet undefined extent. See Bilchitz ‘Minimum Core’ (note 3 above) at 490–493, where he distinguishes a ‘minimal interest’ ‘in survival’ and a ‘maximal interest’ ‘in living well and flourishing’, both of which, according to him, are protected by the socio-economic rights in the South African Constitution. Apart from where I discuss Michelman’s work directly, I will use the term socio-economic rights throughout in this essay.
- 9 These are principally *Douglas v California* 372 US 353 (1963); *Harper v Virginia State Board of Elections* 383 US 663 (1966); *Shapiro v Thompson* 394 US 618 (1969); *Memorial Hospital v Maricopa County* 415 US 250 (1974); *United States Department of Agriculture v Moreno* 413 US 528 (1973); *United States Department of Agriculture v Murray* 413 US 508 (1973); and *New Jersey Welfare Rights Organization v Cahill* 411 US 619 (1973). These decisions indicated at the time that certain classifications on the basis of poverty would be regarded suspect and would require strict scrutiny to pass constitutional muster. See Michelman ‘Welfare Rights’ (note 7 above) at 686–687.
- 10 *Goldberg v Kelly* 397 US 254 (1970) and *Snidach v Family Finance Corp.* 395 US 337 (1969). These decisions required a hearing to be held before access to basic state benefits is revoked. See Michelman ‘Welfare Rights’ (note 7 above) at 687.
- 11 See in particular Michelman ‘Welfare Rights’ (note 7 above) in general.

particular theoretical basis for the recognition of welfare rights as constitutional rights.¹² Drawing on Rawls¹³ and Ely,¹⁴ Michelman emphasises basic need and its satisfaction as a prerequisite for political and social participation, and a guiding value capable of explaining, justifying and giving content to the recognition of constitutional welfare rights.¹⁵

André van der Walt recently introduced South African scholars to this needs-based theoretical explanation of welfare rights and the application it might have in South Africa.¹⁶ For the moment, however, I am interested in only one underlying theme of Michelman's work on welfare rights – the aspect that seems partly to have been the impulse on which he developed his ideas.

In the first of his three main articles on welfare rights,¹⁷ Michelman presents his ideas as a critique of a current of thinking then pre-eminent among American scholars. The mainstream reading of the series of equal protection poverty cases on which he comments, seeks to rationalise these cases as guided in the first place by an animating value of equality. This reading of the cases is an expression of a more general approach to problems of poverty and deprivation holding that such issues are best understood with 'equality or evenhandedness as the guiding value'.¹⁸ For those approaching poverty and welfare rights from this angle, the 'target evil'¹⁹ to combat in efforts to alleviate poverty is not deprivation itself, but relative deprivation. The ultimate aim of such efforts is not an end to deprivation and hardship as such, but something different and much more expansive – 'an end to significant inequality respecting power, resources, standing and the tokens thereof'.²⁰ In short, to the question 'What are welfare rights (and the fight against poverty) for?' the proponents of this 'equal protection' approach would probably have answered: 'The creation of an egalitarian society'.

Michelman's initial response to this equality view of poverty and welfare rights is that it misses the point. For people who are poor, he says, the real problem is not that others are better off (although that certainly is also a problem). Their most urgent problem, which excludes them from the processes and privileges of society, and regardless of their relative position on the socio-economic ladder, is poverty and hardship itself – brutal hunger, homelessness and/or disease. By focusing on the structural problem of a person's relative position on the socio-economic ladder vis-à-vis others, rather than on the concrete problem of such a person's actual hardship and deprivation, the equal protection approach, he argues, looks to the wrong things.²¹

12 Michelman 'On Protecting the Poor' (note 7 above) at 10.

13 R Dworkin 'Distributive Justice: Some Addenda' (1968) 13 *Nat L Forum* 51; 'Constitutional Liberty and the Concept of Justice' in CJ Friedrich & JW Chapman (eds) *Justice (Nomos VI)* (1963) 96; 'The Sense of Justice' (1963) 72 *Phil Rev* 281; 'Justice as Fairness' (1958) 67 *Phil Rev* 164.

14 J Ely 'Constitutional Interpretivism: Its Allure and Impossibility' (1978) 53 *Ind LJ* 399; 'The Supreme Court, 1977 Term – Foreword: On discovering Fundamental Values' (1978) 92 *Harv L Rev* 5; and 'Toward a Representation-Reinforcing Mode of Judicial Review' (1978) 37 *Md L Rev* 451.

15 See Michelman 'On Protecting the Poor' (note 7 above) at 13 – 16 and 'Welfare Rights' (note 7 above) at 666–685.

16 See A van der Walt's contribution to this volume, entitled 'A South African Reading of Frank Michelman's Theory of Social Justice'.

17 Michelman 'On Protecting the Poor' (note 7 above). A recent South African example of this approach is De Vos 'Grootboom' (note 3 above).

18 Michelman 'On Protecting the Poor' (note 7 above) at 10.

19 Michelman at 8.

20 Ibid.

21 Michelman 'On Protecting the Poor' (note 7 above) at 7-9. His critique is of course inevitably much more nuanced and qualified than I can present it here in the space of one paragraph. Indeed, he advances several more specific

In response, Michelman fashions his ‘minimum protection’²² approach. He points out that it is possible to ‘approach the evil of poverty as if it were composed of a complex of absolute, not relative, deprivations’ and that ‘cause for concern is found not in some repugnant discrimination which may accompany a deprivation, but in the severe deprivation itself’.²³ The real problem that welfare rights and other efforts to combat poverty should address is deprivation and hardship itself, a problem that is placed even more sharply in relief, but not eclipsed, by the inequality that inevitably accompanies it. In short, in contrast to the proponents of the equal protection view, Michelman’s answer to the question: ‘What are welfare rights (and the fight against poverty) for?’ would probably be ‘The creation of a society that (at least in the first place) provides in everyone’s basic need and that protects everyone against severe deprivation’.

Michelman’s critique of the equal protection approach to welfare rights – that it remains one step removed from the real problem that welfare rights should be aimed at, namely the concrete and particular experience of deprivation facing desperately poor people – comes close to what I think causes my disappointment with *Soobramoney*, *Grootboom* and *TAC*. The main descriptive point of this essay is that the Constitutional Court, in adopting its particular approach to adjudicating socio-economic rights, has succeeded in removing itself one (or more) step(s) away from the concrete and particular realities of hunger, homelessness, disease and illiteracy that socio-economic rights are meant to deal with. I argue that the Court has done so by proceduralising its adjudication of socio-economic rights. The Constitutional Court’s doctrinal approach to socio-economic rights misses the point in much the same way as the equal protection approach to welfare rights does. It misses the point not because it focuses on a guiding value of equality and an end goal of an egalitarian society,²⁴ but because it focuses on other, equally structural rather than concrete guiding values and ends: structural good governance standards such as legality (rationality and non-arbitrariness), coherence, coordination and inclusivity in government policy formulation and decision-making.²⁵ The target evil at which it is aimed could be read to be not deprivation and hardship and the state’s failure to alleviate it, but arbitrary, inexplicable, unintelligible, exclusionary government action. In short, the Court’s current answer to the question ‘What are socio-economic rights (and, to be more precise, its enforcement of those rights) for?’ could quite plausibly be ‘The

and practical arguments against the equal protection approach and in favour of his own needs-based approach. For a summary see Michelman ‘On Protecting the Poor’ (note 7 above) at 39. For a critique similar to Michelman’s applied to an equal protection approach to the adjudication of public education sufficiency claims based on state constitutions in the US, see H Herskoff ‘Positive Rights and State Constitutions: The Limits of Federal Rationality Review’ (1999) 112 *Harvard LR* 1132 at 1187 and MI Morgan, AS Cohen & H Herskoff ‘Establishing Education Program Inadequacy: The Alabama Example’ (1995) 28 *Univ of Michigan Journal of Legal Reform* 559 at 560. There is also a much larger debate in political philosophy circles about the merits and demerits of needs-based, as opposed to equality-based approaches to development and poverty eradication than I have the space to take account of here.

22 Michelman ‘On Protecting the Poor’ (note 7 above) at 13-16.

23 Michelman at 8.

24 Although equality does play an important role in the Court’s approach. See De Vos ‘*Grootboom*’ (note 3 above) in general.

25 I borrow the phrase ‘good governance standards’ from Theunis Roux, who points out that the Constitutional Court, attempting to mediate what it perceives as potential conflict with the political branches of government, often takes refuge in good governance standards like procedural fairness or rationality: ‘Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court’ (paper presented at the Chr. Michelsen Institute/Faculty of Law, Univ of Bergen workshop on ‘The accountability function of courts in new democracies’ Bergen, Norway, 14-16 November 2002, copy on file with the author) (hereinafter Roux ‘Legitimizing Transformation’).

assurance that government, in attempting to alleviate poverty and hardship, will act in a manner consistent with good governance, and only that.’

I develop this basic descriptive point in Part II below as at least one plausible way in which to read the Court’s record at this early stage of its development.²⁶ But establishing this point alone does not explain my disappointment. A certain degree of such abstraction in the adjudication of socio-economic rights was to be expected and is probably indeed mandated by textual, institutional and political pressures. Why then does it matter at all? I make some suggestions about this in Part III. I point out that the Court’s proceduralisation of its adjudication of socio-economic rights has certain important negative practical consequences: it has the potential to discourage future socio-economic rights litigation; it provides limited tools for the Court to deal with possible future cases (the really difficult ones) where direct claims for the distribution of state resources are brought before it; and it fails to set substantive standards to guide future social and economic policy-making. I also argue that such a proceduralised approach, evaluated as a method to give expression to the more aspirational transformative goals of the Constitution, is theoretically disappointing in a number of ways, principally because it fails to give any form of expression to the substantive political philosophy underlying the Court’s socio-economic rights judgments, presenting them as politically neutral.

II THE DESCRIPTIVE CLAIM

First then to my descriptive claim, that the Constitutional Court has proceduralised its adjudication of socio-economic rights, because it leans toward seeing for itself a formal, structural or procedural, rather than a substantive role in adjudicating these rights.

To explain these suggestions, although *Soobramoney*, *Grootboom* and *TAC* are probably three of the more heavily discussed decisions of the Constitutional Court and are as such well known,²⁷ I first briefly describe the Court’s approach to adjudicating socio-economic rights. This description focuses on the Court’s dealings with the so-called qualified socio-economic rights,²⁸ as the Court has as yet not expressed a coherent approach to adjudicating the direct or

26 The Constitutional Court’s avoidance of substance, inherent in its proceduralisation of socio-economic rights adjudication has been noted, in different degrees and terms, by others. See particularly Roux ‘Understanding *Grootboom*’ (note 3 above) *passim* and Bilchitz ‘Minimum Core’ (note 3 above) at 6-11; ‘Rights’ (note 4 above) at 487-500.

27 See notes 2, 3 and 4 above and the sources cited there. For an excellent recent discussion and comparison of all three decisions, and a comprehensive description and analysis of the doctrine emerging from them, see S Liebenberg ‘South Africa’s Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?’ (2002) *Law, Democracy and Development* 159 (hereinafter Liebenberg ‘Evolving Jurisprudence’). See, in general, also TJ Bollyky ‘R if C > P + B: A Paradigm For Judicial Remedies of Socio-Economic Rights Violations’ (2002) 18 *SAJHR* 161.

28 Those socio-economic rights (the rights of everyone to have access to adequate housing, health care services, sufficient food and water and social security and assistance; the right of everyone to further education; and the right of everyone to have equitable access to land) that are ostensibly subject to the standard qualifications contained in ss 26(2) and 27(2) (‘The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [these] right[s]’), or to similar qualifications. I say ostensibly because various arguments have been made that they are indeed not completely subject to these limiting descriptions. See Liebenberg ‘Evolving Jurisprudence’ (note 27 above) at 181; and *Submissions of the Community Law Centre and Idasa in the matter between the Minister of Health and Treatment Action Campaign, before the*

unqualified rights.²⁹ Thereafter I make a number of points about the Court's approach that I think establish my suggestion.

(a) *The Court's reasonableness policy review approach*

In all three cases – *Soobramoney*, *Grootboom* and *TAC* – the Court focused its interpretive work on one or other of the qualified socio-economic rights in the Constitution. The Court has by now developed a coherent and relatively settled³⁰ approach to the adjudication of these rights, both as regards the nature and extent of the power of review in these matters and the power to award remedies. I shall describe this approach to the adjudication of qualified socio-economic rights throughout as the Constitutional Court's 'reasonableness policy review approach'.

The linchpin of the Court's reasonableness policy review approach is an interpretive move. In all three cases the Court conflated sections 26(1) and 27(1)³¹ of the Constitution with sections 26(2) and 27(2)³² respectively. Stated differently: the Court regards the affirmative aspects of the rights described in sections 26(1) and 27(1) as contained in their totality in sections 26(2) and 27(2) respectively.³³ The Court consistently maintained this interpretive point of departure,³⁴ but probably stated it most explicitly in *Grootboom*, in a passage referring to the relationship between sections 26(1) and (2):

Constitutional Court of South Africa (copy on file with the author) (hereinafter the *TAC amicus*-brief) par [10]–[35].

- 29 Those socio-economic rights that are not subject to the same qualifications as the qualified socio-economic rights and are so thought to impose direct or unqualified duties. These are children's rights to basic nutrition, health care services, social services and shelter (s 28(1)(c)); detained persons' right to be provided, at state expense, with adequate nutrition, accommodation, reading material and medical treatment (s 35(2)(e)); everyone's right to basic education (s 29(1)(a)); and everyone's right not to be refused emergency medical treatment (s 27(3)) and not to be evicted arbitrarily (s 26(3)). I address the Court's treatment of these rights briefly in 2.2 below. See the text below accompanying notes 101–113.
- 30 Although one should as yet be wary to attribute to the Court's current approach to socio-economic rights too large a degree of permanence, the Court itself seems to be clear that it has found its line and is going to stick to it. This is most evident in *TAC*: The Court responded as follows to an argument challenging its approach as laid down in *Grootboom*: 'This argument fails to have regard to the way subsections (1) and (2) of both sections 26 and 27 are linked in the text of the Constitution itself, and to the way they have been interpreted by this Court in *Soobramoney* and *Grootboom*'. (My emphasis.) (*TAC* note 4 above par [29] at 738E/F – F/G). The Court has also stuck to its approach in other matters, once formulated, with some tenacity. See for instance its remarks in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6, 1998 (12) BCLR 1517 (CC) par [58]–[64] at 38C/D–40E/F, defending its approach to adjudicating equality challenges against a dissenting argument. In the past the Court has been wary of settling on an approach too soon (see the remarks, again regarding the equality test, in *Prinsloo v Van der Linde* 1997 (3) SA 1012, 1997 (6) BCLR 759 (CC) par [20] at 1023D/E–E/F). It could be productive to investigate why the Court elected to settle on its approach to socio-economic rights so quickly in comparison to other areas of its jurisprudence.
- 31 S 26(1) states everyone's right 'to have access to adequate housing', s 27(1) everyone's right to have access to health care services, sufficient food and water and social security and assistance.
- 32 Both determine that '[t]he state must take reasonable legislative and other measures to achieve the progressive realisation of [those] rights'.
- 33 *Soobramoney* note 2 above par [11] at 771G/H–II; *Grootboom* note 3 above par [34] at 66F/G–H/I and par [38] at 67G/H–IJ; *TAC* note 4 above par [23] at 736A/B–B/C and in particular par [29]–[32] at 738E/F–739D.
- 34 In *Soobramoney*, in a passage cited with approval both in *Grootboom* (*Grootboom* note 3 above par [46] at 70H–I) and *TAC* (*TAC* note 4 above par [31] at 738I–739A), the Court held that '... the obligations imposed on the State by ss 26 and 27 ... are dependent upon the resources available for such purposes, and ... the corresponding rights themselves are limited by reason of the lack of resources.' (*Soobramoney* note 2 above par [11] at 771G/H–I.)

[Section 26] has been carefully crafted. It contains three subsections. The first confers a general right of access to adequate housing. The second establishes and delimits the scope of the positive obligation imposed upon the State ...³⁵

This interpretive move has had the important consequence of allowing the Court to hold that, regarding qualified socio-economic rights, the sum of the state's affirmative duty is to act reasonably, within available resources, to achieve its progressive realisation, whilst the sum of affirmative entitlement conferred by these rights³⁶ is an entitlement to reasonable state conduct, conditioned by available resources and aimed at the progressive realisation of the rights.³⁷ As a result, the Court described its own role in determining whether government has met its affirmative obligations as to inquire whether government has acted reasonably, taking into account the resources at its disposal for those particular purposes and the fact that these rights cannot (need not?) be implemented immediately, but over time.³⁸ Unfortunately, the Court has as yet not been clear as to what exactly this role entails. That is, although the Court has listed, in quite detailed terms, the factors that it would take into account to evaluate reasonableness,³⁹ it has not explicitly described the nature of its socio-economic rights reasonableness review. Does the Court have in mind the kind of rationality review that it applies in equality cases in the context of section 9(1) inquiries?⁴⁰ Or does it envision its reasonableness policy review method to incorporate also elements of proportionality (between ends and effect) and requirements of 'consistency with accepted moral values and common sense, and ... due regard to the interests of others'⁴¹ as reasonableness in the administrative law context seems to demand?⁴²

It seems relatively clear that, as far as the structure of its review in socio-economic rights cases goes, the Court sees itself applying the same kind of means-end justificatory model as

35 *Grootboom* note 3 above par [21] at 61F/G–G. Cited with approval in *TAC* note 4 above par [32] at 739B–B/D.

36 I use here a distinction between affirmative (positive) and negative duties and entitlements on a fairly basic level: the former require the party on whom they are imposed to act, to do something (to use the language of s 7(2) of the Constitution, to '... protect, promote and fulfil'), whereas the latter require it to refrain from acting (s 7(2)'s 'respect'). For a persuasive problematisation of this distinction see S Bandes 'The Negative Constitution: A Progressive Critique' (1990) 88 *Mich LR* 2271 at 2323–2326. For a brief discussion of the difficulty of making this distinction in South Africa, see Liebenberg 'Evolving Jurisprudence' (note 27 above) at 178, particularly note 100. The Court has been careful to point out that ss 26(2) and 27(2) apply only to the affirmative duties of the state, locating the possible negative duties imposed by the respective rights squarely in ss 26(1) and 27(1). (*Grootboom* note 3 above par [34] at 66G–H) The implication is that the negative duties imposed by these rights are not subject to the qualifications contained in ss 26(2) and 27(2). See Liebenberg 'Evolving Jurisprudence' (note 27 above) at 178, 183.

37 *Grootboom* note 3 above par [33] at 66B–C and par [41] at 68G/H–H/I. For a restatement of the principle in *TAC* note 4 above see par [33] at 739D–E, par [36] at 740A/B–D, and par [38] at 740E/F–G/H. In *Soobramoney*, although a different standard of scrutiny (rationality and honesty) was employed, the same model of review with regard to s 27(1) was already in place. See *Soobramoney* note 2 above par [25] at 775C/D–D/E.

38 *Grootboom* note 3 above par [41] at 68G–H/I. In *TAC* note 4 above see par [36] at 740A/B–D, in *Soobramoney* note 2 above par [29] at 776C–D.

39 See below, text accompanying notes 49–55.

40 For an early statement of this method and standard of review, see *Prinsloo v Van der Linde* 1997 (3) SA 1012, 1997 (6) BCLR 759 (CC) par [25]–[26] at 1024F/G–1025C/D.

41 D Airo-Farulla 'Administrative Law: Rationality and Judicial Review of Administrative Action' (2000) 24 *Melbourne Univ LR* 543 at 559–560.

42 See *Roman v Williams* 1998 (1) SA 270 (C) at 281C–284E/F; *Carephone Pty (Ltd) v Marcus NO* 1999 (3) SA 304 (LAC) par [30]–[37] at 314H/I–316E/F; and, most recently, *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 (3) SA 265, 2002 (9) BCLR 891 (CC), Chaskalson CJ's majority judgment, par [127] and [128] at 300G/H–301B/C and Mokgoro J and Sachs J's joint dissent, par [161]–[166] at 314E–316F.

that which operates in section 9(1) rationality review cases.⁴³ The basic question the Court asks is whether a particular policy or programme can be justified, and it will be justified if it is reasonably related to the constitutionally prescribed goal of providing access to adequate housing or health care services (or sufficient food and water, or social security and assistance). As the Court stated in *Grootboom*, the question it needs to determine is whether the programme or policy before it (the means) is '[reasonably] capable of facilitating the realisation of the right'⁴⁴ in question (the end).

What is not so clear is what degree of intensity the Court will use to interrogate the link between policy measure and goal within this means-end justificatory review model – it seems to have applied a different standard of scrutiny⁴⁵ in all three of its socio-economic rights cases. In *Soobramoney*, the standard was one of simple rationality. The Court simply asked whether the policy was rationally conceived and applied in good faith.⁴⁶ Its inquiry was limited to whether the policy, on its face, was rationally linked to the goal of providing access to health

43 I refer here to the *model* or *method* of review, rather than the standard of scrutiny employed within it. The model of review I refer to is one in which a court sees its role as to determine the rationality or reasonableness of conduct that is alleged to have limited a right, by asking whether it is sufficiently related to the (legitimate) goal for which it was intended. This model of review differs from the so-called two-stage approach to rights adjudication (suggested by the structure of the South African Bill of Rights and adopted by the Constitutional Court in areas other than socio-economic rights adjudication since its initial articulation in *S v Zuma* 1995 (2) SA 642, 1995 (4) BCLR 401 (CC) par [21] at 654F/G–I/J), in terms of which the role of the court is to interpret the right in question, decide whether the conduct complained of has violated it and if so, to decide whether that limitation can be justified. For a brief overview of the nature, merits and demerits of the two-stage approach, see S Woolman 'Limitation' in M Chaskalson et al *Constitutional Law of South Africa* (1st ed, 2nd Rev Service 1999) 12–2 to 12–4). Means-end rationality (or reasonableness) review is a model of review that the Constitutional Court has increasingly been employing, including in contexts other than its adjudication of socio-economic rights and s 9(1) equality claims (see note 41 above). For an early and particularly robustly formulated example, see *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191, 1999 (5) BCLR 489 (CC), both Yacoob J's majority judgment, par [19] at 203H/I–204A/B and O'Regan J's minority judgment, par [122]–[125] at 239C/D–241F/G. See also *Jooste v Score Supermarkets* 1999 (2) SA 1, 1999 (2) BCLR 139 (CC) par [17] at 12C/D–G/H and, most recently, *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 (3) SA 265, 2002 (9) BCLR 891 (CC), Chaskalson CJ's majority judgment par [127] and [128] at 300G/H–301B/C and Mokgoro J and Sachs J's joint dissent par [161]–[166] at 314E–316F.

44 *Grootboom* note 3 above par [41] at 68F–G. See also par [46] at 71A–B: 'There is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively ...'

45 My distinction between the *structure* (or model, or method) of review and the *standard of scrutiny* employed within whatever model of review is employed needs some clarification. When I refer to the model of review, I mean the basic question a court asks when reviewing law or conduct for constitutionality – does it for instance simply ask whether the measure that is alleged to violate a right is sufficiently related to an acceptable governmental goal (as the US rationality review model would have it), or does it first ask whether the right in question is in fact violated by the impugned conduct or law and only if that is so, enter into a consideration of its justifiability (consider the link between means and end) as the Canadian and South African two-stage review model would have it (see note 44 above)? In its socio-economic rights cases, the Constitutional Court has opted for the former model of review. When I speak of *standard of scrutiny* I mean the intensity with which a court chooses to interrogate the basic question implied by its chosen model of review. In the context of the means-end reasonableness review model that the Constitutional Court has chosen for its socio-economic rights cases, standard of scrutiny refers to the intensity with which the Court chooses to test the link between chosen means and constitutionally required end. The standard of scrutiny itself operates on two related but distinct levels. First, it is important to know what is required of a policy measure or rule of law to be sufficiently related to its goal. Does it only need to be rationally related to its goal in the sense that, within the very outer limits of reason, it is conceivable that it can achieve its required goal, or should it indeed be likely to achieve its goal, so that some questions are asked about its relative efficiency and effectiveness in achieving its goal? Second, it is also important to know the evidentiary burden or burden of persuasion that a court's chosen standard of scrutiny imposes on the parties before it. I explore only the former here.

46 *Soobramoney* note 2 above par [25] at 775C/D–D/E and par [29] at 776C–C/D.

care services, in the sense that, within the bounds of logic, it could conceivably achieve its goal.

The standard applied in *Grootboom* was clearly much more substantial. The Court there indicated that its standard of reasonableness, in addition to *Soobramoney*'s reasonableness, requires the state's policies and programmes intended to implement socio-economic rights to be comprehensive⁴⁷ and coherent,⁴⁸ coordinated,⁴⁹ flexible,⁵⁰ inclusive of all significantly at-risk sectors of society,⁵¹ sensitive to various degrees of deprivation⁵² and reasonably implemented as well as conceived.⁵³ Taken together, these factors indicate that the Court in *Grootboom* required a much stronger link between the policy at issue and its constitutionally mandated goal than in *Soobramoney*. Although the Court stops short of applying a 'full-blown proportionality test',⁵⁴ it leans significantly closer to incorporating such an element into its standard of scrutiny, narrowing the range of policy options that it would be legitimate for government to choose from and thinking about the relative efficiency of different policy options. In *Grootboom* the question seems to have become whether the policy at issue was likely to achieve its goal.

In *TAC* the standard of scrutiny becomes stricter still. Apart from adding a new factor to the list of factors used to determine the reasonableness of policies (transparency),⁵⁵ the Court here limits the range of policy options that would be reasonable in light of the right to have access to health care services even further than it did in *Grootboom*. The Court in *TAC* makes a number of quite detailed findings of fact,⁵⁶ interrogates the wisdom of government's policy choice not to extend the provision of Nevirapine beyond the designated pilot sites closely,⁵⁷ and finds the policy option proposed by the respondents in the matter to be superior in a number of respects to government's position.⁵⁸ Indeed, the Court in *TAC* comes close to asking whether government's chosen policy option will achieve its constitutionally mandated end (and finds that it will not).

This shifting standard of scrutiny that the Court exhibits in the three cases does seem to be a conscious strategy rather than a mark of conceptual confusion. As Pierre de Vos has suggested,⁵⁹ and as the Court itself has explicitly stated in a slightly different context,⁶⁰ the

47 *Grootboom* note 3 above par [40] at 68C–C/D.

48 *Grootboom* par [41] at 68F–F/G.

49 *Grootboom* par [39] and [40] at 67J–68F.

50 *Grootboom* par [43] at 69D/E–E. See also *TAC* note 4 above par [68] at 748C–C/D.

51 *Grootboom* par [43] at 69E–E/F. See also *TAC* note 4 above par [68] at 747H/I–I and 748C–C/D.

52 *Grootboom* par [44] at 69F/G–G/H. See also *TAC* note 4 above par [68] at 747H/I–I.

53 *Grootboom* par [42] at 69C–D.

54 Roux 'Understanding *Grootboom*' (note 3 above) at 117: 'The Court's assessment is thus not directed at the question whether the state might have adopted less restrictive measures in pursuing the programme in question ...'.

55 *TAC* note 4 above par [123] at 762B/C–E. See also Liebenberg 'Evolving Jurisprudence' (note 27 above) at 184.

56 The Court for instance rejects government's contentions that Nevirapine is not safe for use in prevention of MTCT of HIV (*TAC* note 4 above par [60]–[63] at 746A–747A) and that no capacity to counsel patients before the administration of Nevirapine and to monitor the use and effect of the drug after administration existed outside the designated pilot sites (*TAC* note 4 above par [84]–[88] at 751A/B–752B).

57 *TAC* note 4 above par [48]–[81] at 743B–750F.

58 *TAC* par [93]–[95] at 754B–I.

59 De Vos 'Grootboom' (note 3 above) in general, but particularly at 259–260 (the difference in standard of scrutiny employed by the Constitutional Court in *Soobramoney* and *Grootboom* can be explained by the differences in the facts of the two cases: In *Soobramoney* the applicant was a relatively privileged person claiming an advanced level of state assistance on an individual basis, whereas in *Grootboom* the challenge was brought by a group of

standard of scrutiny with which the Court will examine the link between a particular policy choice and its constitutionally prescribed end will be determined by the context of a particular case. It is not entirely clear which aspects of the context will weigh most heavily with the Court in making this choice, but it does seem that the position of a claimant or group of claimants in society,⁶¹ the nature and importance of the interest affected,⁶² the nature and extent of the alleged rights violation⁶³ and the nature of the impugned measure⁶⁴ play an important role.

In applying this standard of scrutiny, the Court has been wary of separation of power concerns, taking care, despite the clearly intrusive nature of its inquiry and findings in *Grootboom* and particularly in *TAC*, to emphasise that it does not go further than ‘institutional incapacity and appropriate constitutional modesty’⁶⁵ allow. On the Court’s explicit version the reasonableness standard does not test the relative wisdom of different possible policy choices and, when applied, does not lead to the Court substituting its own substantive decisions for those of the executive. It is simply used to determine whether a particular policy choice is one of the potentially large number of such choices that falls within the bounds of reasonableness.⁶⁶ In the words of the Court: ‘A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent’.⁶⁷

This same caution to avoid intruding on the powers of the political branches is evident in the way the Court has gone about fashioning its orders. In *Grootboom* the Court, having found the state’s housing policy to be unconstitutional, declared it so, but went no further than that. The Court attached no directory order describing specific relief for the respondents and those in the same position as they to its declarator.⁶⁸ In *TAC* the Court did issue, in addition to its declarator, a quite specific directory order, requiring the state to make Nevirapine available at public health facilities other than the designated pilot sites.⁶⁹ However, not too much should be read

absolutely destitute people, claiming a very basic level of state assistance in a situation where the state had, with regard to their particular basic needs, simply failed to act at all).

60 *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 (3) SA 265, 2002 (9) BCLR 891 (CC), per Chaskalson CJ, par [127] at 300GH: ‘The approach now adopted by the Courts of England to judicial review in public law cases, is that “the intensity of review ... will depend upon the subject matter in hand”’. (Quoting *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433 9HL at par [28].)

61 See De Vos ‘*Grootboom*’ (note 3 above) at 266.

62 *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 (3) SA 265, 2002 (9) BCLR 891 (CC) par [127] at 300H–I.

63 De Vos ‘*Grootboom*’ (note 3 above) at 266. See also, in general, Bollyky (2002) 18 *SAJHR* 161 (note 27 above).

64 *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 (3) SA 265, 2002 (9) BCLR 891 (CC) par [127] at 300I.

65 *Soobramoney* note 2 above per Sachs J, par [58] at 784C/D–D/E.

66 Stated differently: it does not incorporate any element of true proportionality.

67 *Grootboom* note 3 above par [41] at 68H–I. See also *TAC* note 4 above par [36], at 740A/B–D.

68 For a discussion of the order in *Grootboom* see Roux ‘Understanding *Grootboom*’ (note 3 above) at 50–51 and Pillay (note 3 above) in general.

69 *TAC* note 4 above par [135] at 765D–H:

‘Government is ordered without delay to:

- Remove the restrictions that prevent Nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that are not research and training sites.
- Permit and facilitate the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV and to make it available for this purpose at hospitals and clinics when in the judgment of the attending medical practitioner acting in consultation with the medical superintendent of the facility concerned this is medically indicated, which shall if necessary include that the mother concerned has been appropriately tested and counselled.

into this. Contrary to the situation in *Grootboom*, where the gap in the state's housing policy was of a general nature, allowing for a large number of different plausible ways to rectify it, the issue in *TAC* was quite specific. Once the Court had declared the state's specific policy choice not to make Nevirapine available unconstitutional, the directive that Nevirapine should now be made available was necessarily implied. In fact, the Court's directory order in *TAC* seems to have been intended more to qualify and circumscribe its declarator than to make it more intrusive. The Court made it clear in the directory order that instead of Nevirapine simply being made available at all public health facilities where women gave birth (as a bald declarator would have implied) it should only be provided to a woman if indicated in the opinion of the attendant physician in consultation with his or her supervisor, who will come to their decision in this regard taking into account the availability of appropriate testing, counselling and monitoring infrastructure at their particular institution.⁷⁰ Furthermore, in both cases the Court shied away from issuing a full-blown structural or supervisory interdict, which would have retained for it the power to monitor the enforcement of its order.⁷¹

To summarise the most important characteristics of the Court's reasonableness policy review approach to adjudicating qualified socio-economic rights: it employs a model of means-end review, within which the standard of scrutiny is reasonableness, which claims to concern itself not with the relative wisdom of different policy choices, but 'simply' with its reasonableness.

(b) Structure rather than substance/Good governance rather than need

How then does the Court's approach so described support my suggestion that it has effectively proceduralised its adjudication of socio-economic rights in the sense that its first concern in adjudicating these rights are structural principles of good governance, rather than deprivation and need and its alleviation?

As I suggest above,⁷² the Court's reasonableness policy review method requires it to ask whether challenged policies are reasonably capable of achieving their constitutionally mandated goals, or, stated differently, whether there is a reasonable link between the policy and its constitutionally mandated goal. Helen Herskoff, proposing a model of review for US state court adjudication of state constitutional welfare rights claims, describes this role of courts as follows:

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- Make provision if necessary for counsellors based at public hospitals and clinics other than the research and training sites to be trained for the counselling necessary for the use of Nevirapine to reduce the risk of mother-to-child transmission of HIV.
 - Take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.'

70 In *Grootboom* the Court, in an off-hand remark, requested the South African Human Rights Commission to 'monitor and, if necessary, report ... on the efforts made by the State to comply with its s 26 obligations in accordance with this judgment' (*Grootboom* note 3 above par [97] at 86H/I–87A/B. However, the Court neglected itself to remain seized of the matter.

71 An argument also stands to be made that the Court in *TAC* regarded itself able to make the kind of strong directory order it did only because it felt that it was ordering government to extend an existing policy choice to its logical conclusion. Thus the directory order in *TAC* can be likened to a *mandamus* in the strict sense – an order directing an organ of state to implement a legally recognised (in this case a politically already accepted) duty.

72 See 2.2 above, text accompanying notes 43–45.

A ... court faced with a ... constitutional welfare challenge ought to subject a legislative classification [or policy choice] to rigorous scrutiny to determine whether the provision [or policy] is likely to effectuate the constitutional goal.⁷³

This kind of ‘consequentialist’⁷⁴ understanding of the reasonableness standard is, again as pointed out above,⁷⁵ in its structure similar to ‘rational relation’ review in section 9(1) equality cases, with one crucial difference. Any model of means-end rationality or reasonableness review, whatever its standard of scrutiny, requires of a court not only to determine whether there is a sufficiently plausible link between means and stated end, but also to determine whether the chosen end is acceptable.⁷⁶ Rationality review in section 9(1) equality challenges requires a court on review to determine whether an administrative decision or other form of conduct or legislative choice is reasonably or rationally related to any legitimate government purpose. The choice of end to pursue remains the government actor’s, and the role of the courts in these instances is limited to determining whether that chosen end, whatever it is, is (constitutionally) legitimate.⁷⁷

The reasonableness test in socio-economic rights cases does not allow government actors this same freedom. In terms of the socio-economic rights reasonableness test, government cannot choose the goal that it wants to pursue through its policies and pursue it as long as it is constitutionally legitimate. The Constitution authoritatively presents it with a goal (the realisation of, for instance, the right to have access to health care services) and it has to be able to show that its policies are reasonably linked to that specific goal.⁷⁸ A court applying the socio-economic rights reasonableness standard therefore does not simply test whether a goal is legitimate. It has to determine whether government is pursuing the correct, constitutionally prescribed goal with its policies.⁷⁹ This necessarily means that, at least at some level, a court has to determine what the constitutionally prescribed goal is – to exercise its means-end inquiry in the context of socio-economic rights adequately, a court is hidebound to describe these rights substantively and to determine what it is that the Constitution requires government to work towards.⁸⁰

73 Herskoff (note 21 above) at 1184.

74 Ibid.

75 See 2 above, text accompanying note 44.

76 Airo-Farulla (2000) 24 *Melbourne Univ LR* 543 (note 41 above) at 546: ‘[A] means-end model of rational action must be concerned not only with the relationship between means and ends, but also with the rationality of the ends themselves. Put simply, the rational pursuit of an irrational end is irrational’.

77 See Herskoff (note 21 above) at 1137 (quoting H Thayer ‘The Origin and Scope of the American Doctrine of Constitutional Law’ (1893) 7 *Harv LR* 129 at 144): ‘[R]ationality review reflects the fact that “the constitution does not impose upon the legislature any one specific opinion, but leaves open ... [a] range of choice; and that whatever choice is rational is constitutional”.’

78 See Herskoff (note 21 above) at 1171, commenting on the effect of positive welfare rights provisions in the New York state constitution: ‘Unlike the [US] Federal Constitution... New York’s Article XVII *commits the state to a particular policy judgment*; Article XVII contains a specific, affirmative command compelling the political branches to provide for the “aid, care and support of the needy.” On this issue, at least, the legislator is not merely a conduit for the shifting preferences of voters. She is instead a *constitutional agent charged with carrying out a fundamental public policy*.’ and at 1156: ‘[P]ositive rights are not simply structural limits on governmental power; they are also prescriptive duties compelling government to use such power to achieve *constitutionally fixed social ends*. (My emphasis.)’

79 Herskoff (note 21 above) at 1145: ‘[W]hen a ... constitution commits the state to particular public policies, the role of the ... court is to ensure that government uses its assigned power to achieve, or at least move closer to achieving, *the specified goals*.’

80 A conceptual difficulty that can get in the way here is the distinction between specific things that government can do to reach its goals and the end goals themselves. The latter are the courts’ business to determine (the courts set a

The problem is that the Constitutional Court has generally avoided describing the constitutionally required ends that government must pursue with its policies in any form of useful detail. This is evident in the Court's description and application of its reasonableness test. In none of the three cases does the Court provide a satisfactory description of the substantive content of the rights in question. In *Soobramoney* the first reference to the content of the socio-economic rights in the Constitution focuses exclusively on the limits imposed by sections 26(2) and 27(2), rather than the substance of the rights themselves.⁸¹ These limits on the substantive ends that the rights (and in that case the right to have access to health care services) require government to pursue, rather than the substantive ends themselves, are then what engage the Court's interpretive efforts throughout the judgment.⁸² The only substantive references to the ends that government is required to pursue are oblique and indirect. So, for instance, the Court approves of the respondent's dialysis programme's focus on curative treatment rather than the maintenance of patients suffering incurable conditions, possibly suggesting that such a focus on curative treatment is constitutionally preferred.⁸³ Elsewhere the Court's analysis suggests a similar preference for preventative treatment.⁸⁴ But none of these references is explicit. As a result, it is not clear whether the Court accepts these policy focuses because they are what the Constitution requires, or because they are simply within the bounds of legitimacy and as such acceptable goal choices made by the provincial health authorities.

In *Grootboom* the court hardly fared better. Again, as in *Soobramoney*, when turning to interpreting the right to have access to adequate housing, the Court's focus is not on the substantive standards that the right requires government to meet, but almost exclusively on the limits to government's obligations imposed by section 26(2). The section of the judgment under the heading 'Obligations imposed on the State by section 26'⁸⁵ starts with a discussion of the approach to interpretation of socio-economic rights that the Court intends to use.⁸⁶ The central point in this discussion is that the right to have access to adequate housing should be construed within its textual context, with the result that the content of the right should be read through the prism of the qualifications in section 26(2).⁸⁷ From this point of departure, the Court's eventual discussion of the content of the right predictably focuses on the concepts 'reasonableness',⁸⁸ 'progressive realisation'⁸⁹ and 'within available resources'.⁹⁰ Nowhere is

substantive standard that government must work towards achieving), whilst the former (within the bounds of reasonableness, of course) are the choice of the state actor. For a fuller discussion of this distinction, see Bilchitz 'Minimum Core' (note 3 above) at 487–488.

81 *Soobramoney* note 3 above par [11] at 771G/H–I: 'What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. *This is the context within which s 27(3) must be construed.*' (My emphasis.)

82 See the discussion in *Soobramoney* note 2 above par [22]–[31] at 774E/F–777C/D, focusing on the limited resources at the disposal of the respondent and the qualification that this places on the applicant's claim.

83 *Soobramoney* note 2 above par 25 at 775B/C–D.

84 *Soobramoney* note 2 above par [19] at 774A–B.

85 *Grootboom* note 3 above par 20 at 61E/F.

86 *Grootboom* note 3 above par [21]–[25] at 61F–62H.

87 *Grootboom* note 3 above par [21] at 61F–H. See also par [34]–[38] at 66E–67I (section headed 'Analysis of s26') where this point is emphasised.

88 *Grootboom* note 3 above par [39]–[44] at 67I/J–69H/I.

89 *Grootboom* note 3 above par [45] at 69I–70F.

90 *Grootboom* note 3 above par [46] at 70F/G–71A/B.

there a sustained and coherent attempt to describe the substantive standard that government's policies are supposed to work towards.⁹¹ The one such reference (the Court stating that the right 'entails more than bricks and mortar' and that, for the right to be realised, 'there must be land, there must be services, there must be a dwelling')⁹² is cursory, without any reasoning provided to sustain it. Furthermore, this brief description of the content of the right occurs in the course of a broader argument that housing needs are diverse and determined by the geographic, social and economic context in which they play out and that, as such, it is impossible for a court to prescribe particular substantive duties in terms of the right.⁹³

TAC, unfortunately, does not buck the trend. Again, when discussing the content of the right to have access to health care services, the Court's focus is on the qualifications placed on the obligations imposed on government, rather than on the content of those obligations themselves.⁹⁴ The result is predictable – as David Bilchitz has put it:⁹⁵

[T]he [TAC] judgment is notable for the virtual absence of any analysis of what the right to have access to health-care services involves. What are the services that one is entitled to claim access to? Do these services involve preventative medicine such as immunizations, or treatment for existing diseases or both? Does the right entitle one to primary, tertiary, secondary health care services or all of these?

The reluctance of the Court to describe the substantive policy goals that socio-economic rights set for government is no accident. Two aspects of the Court's dealings with these rights indicate that the Court avoids substance consciously. Firstly, in both *Grootboom* and *TAC*, the Court was confronted with arguments by *amici curiae* that the rights enumerated in sections 26(1) and 27(1) confer minimum core entitlements and impose minimum core duties, which are not subject to the qualifications of sections 26(2) and 27(2) respectively.⁹⁶ These arguments were presented as attempts to persuade the Court that under circumstances of extreme deprivation, despite the two qualifying subsections, sections 26 and 27 provide claims for concrete individual relief against the state that must be met as a matter of priority. This argument was rejected by the Court in both cases, in *TAC* quite emphatically.⁹⁷ The fact that the Court so firmly rejected the notion that the qualified socio-economic rights, in cases where deprivation is severe, confer concrete, prioritised particular entitlements, that is, that these rights pose substantive standards for government conduct, is significant for my purposes in itself.⁹⁸ But more important for my argument is the basis on which the Court rejected this notion: in both *Grootboom* and *TAC* perceived difficulties in describing the minimum core

91 For an example of such a sustained analysis of the substantive standards that the right to have access to adequate housing poses, see Bilchitz 'Minimum Core' (note 3 above) at 490–494.

92 *Grootboom* note 3 above par [35] at 66H–67A/B.

93 *Grootboom* note 3 above par [36]–[38] at 267B/C–I. This passage exhibits the conceptual confusion, alluded to in note 82 above, between standards to test government conduct against and the specific things that government can do to satisfy those standards. For a criticism of this confusion see Bilchitz 'Minimum Core' (note 3 above) at 487–488.

94 *TAC* note 4 above par [23]–[39] at 736A–740I and par [67]–[73] at 747G–749B.

95 Bilchitz 'Rights' (note 4 above) at 6.

96 See *TAC amicus*-brief (note 29 above) par [10]–[34].

97 *Grootboom* note 3 above par [33], at 66A–D/E; *TAC* note 4 above par [34] and [35] at 739E–740A and par [37] at 740D–D/E.

98 For one, it confirms that the Court indeed sees the positive aspects of the rights enumerated in ss 26(1) and 27(1) as described and delimited in their totality by ss 26(2) and 27(2) respectively.

content of the rights involved loomed large in the Court's decision not to incorporate the notion in its jurisprudence. The Court states its position on this point clearly in *TAC*, when it says: '[C]ourts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second amici should be ...'⁹⁹ The Court quite clearly here declares itself unwilling to describe the substantive content of socio-economic rights.

The Court's conscious retreat from substance in its adjudication of socio-economic rights is finally evident in its treatment of everyone's right not to be refused emergency medical treatment¹⁰⁰ in *Soobramoney* and its treatment of children's rights to shelter and basic health care services¹⁰¹ in *Grootboom* and *TAC* respectively. Prior to the decisions in *Soobramoney*, *Grootboom* and *TAC*, all three these rights were regarded by most commentators as rights that imposed prioritised duties for the direct provision of a basic level of essential services on the state.¹⁰² The Court put paid to these expectations in different ways, all of which are telling. In *Soobramoney* the Court succeeded in interpreting the right not to be refused emergency medical treatment virtually out of existence. First, it defined 'emergency medical treatment' to mean only treatment required for a sudden catastrophe, which requires immediate attention to avert death or serious harm.¹⁰³ Second, applying a process of purposive/historical interpretation,¹⁰⁴ the Court pointed out that South African history is replete with examples of people being refused access to life-saving emergency medical treatment on the basis of their race alone. As a result the Court concluded that the purpose with which the right not to be refused emergency medical treatment was included in the Constitution was to avoid a recurrence of such outrages.¹⁰⁵ This finally led the Court to hold that the right was intended not to require the state to positively make emergency medical treatment available, but to prohibit only the arbitrary (irrational, *mala fide*) refusal of existing emergency medical treatment.¹⁰⁶ Again a substantive standard (a holding, which would have been plausible on the text, that government is obliged to make emergency medical services, however defined, available and is prohibited from removing existing emergency medical services)¹⁰⁷ and the need to describe that substantive standard, is consciously avoided, here very clearly in favour of a structural standard of non-arbitrariness.

⁹⁹ *TAC* note 4 above par [37] at 740D–D/E.

¹⁰⁰ S 27(3).

¹⁰¹ S 28(1)(c).

¹⁰² For an example see P de Vos 'Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* 67 (hereinafter De Vos 'Pious Wishes') at 84. There was consensus on this view because the text of the Constitution seems clearly to suggest it. For a current statement of this view see Liebenberg 'Evolving Jurisprudence' (note 27 above) at 163.

¹⁰³ *Soobramoney* note 2 above par [20] at 775C–D. In this way the Court effectively excluded the claim of the appellant for the provision of prolonged treatment of a chronic but ultimately fatal condition from the scope of the right.

¹⁰⁴ *Soobramoney* note 2 above par [17] at 772H–773A/B.

¹⁰⁵ *Soobramoney* note 2 above par [20] at 774C–D/E, in particular note 10.

¹⁰⁶ *Soobramoney* note 2 above par [20] at 774C/D–D. Craig Scott and Phillip Alston have pointed out that this interpretation of s 27(3) renders it redundant, or superfluous, as the same limited duty that the right thus interpreted imposes has been recognised as imposed by s 27(1). See Alston & Scott (note 2 above) at 245–248.

¹⁰⁷ As Sandy Liebenberg has pointed out, the Court's limited interpretation of s 27(3) does not only exclude claims based on it for the creation of emergency medical services where there are none, it also excludes claims to prevent the cancellation of existing emergency medical services, for example as a result of budget cuts. See Liebenberg 'Evolving Jurisprudence' (note 27 above) at 165.

In *Grootboom* and *TAC* the Court managed in a slightly different fashion to avoid attributing any meaningful substantive content to children's rights to shelter and to basic health care services respectively.¹⁰⁸ In both *Grootboom* and *TAC* argument was advanced that children's socio-economic rights imposed prioritised duties for the direct provision of basic shelter and basic health care services on the state. Indeed, in *Grootboom* the order of the High Court was based on this notion.¹⁰⁹ In both cases the Constitutional Court in response advanced a somewhat tortuous but still relatively expansive interpretation of these rights. First it held that section 28(1)(c) should be read with section 28(1)(b), with the effect that the duty to provide shelter and health care services to children lies first on parents and only burdens the state in cases where parents or families are unable to care for children.¹¹⁰ Towards children who are cared for by their parents or families, the state has the duty to 'provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28' and in addition its section 26 and 27 duties to provide families with access to basic services and resources progressively and subject to available resources.¹¹¹ But towards children who do not receive the requisite care from their families or parents, the state incurs a positive duty to provide in their basic needs – that is to provide them with shelter, health care services and other necessities as a matter of priority.

However, curiously, despite its finding that a substantive duty for the provision of basic necessities to children exists, the Court managed in both cases to avoid applying that substantive duty as the basis for its decision, and so avoided having to describe it. In *Grootboom* the Court did so consciously, holding that the children in the Grootboom community '[were] being cared for by their parents; [were] not in the care of the State, in any alternative care, or abandoned' and were as such not entitled to care from the state.¹¹² But in *TAC*, having discussed the substantive duties that children's right to basic health care services impose on the state, the Court simply ignored them in its eventual decision.

What are the consequences of the Court's assiduous avoidance of substance? The failure of the Court to describe the ends that government's policies must pursue in a substantive fashion leaves its means-end reasonableness test without its essential referent. In other words: the Court does not ask whether state policies are reasonable in the sense that they are reasonably

108 On the interpretation of children's rights in *Grootboom*, see in general Sloth-Nielsen (note 3 above); and on *TAC* see J Sloth-Nielsen 'Evolving Jurisprudence on Children's Socio-Economic Rights' paper presented at Community Law Centre Workshop on *HIV/Aids and the infant's right to nutrition*, Cape Town, South Africa (15 October 2002). See also J Sloth-Nielsen 'Too Little, Too Late? Provisioning for Child-Headed Households' (2002) 3:1 *ESR Review* 24–25.

109 Davis J in the Cape High Court ordered the state to provide the *Grootboom* community with temporary shelter, basing his order on s 28(1)(c) read with 28(2) of the Constitution (*Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C) (hereinafter *Grootboom I*) at 287C–291H and at 293G/H–294C). For a thorough and wide-ranging discussion of the Cape High Court decision in *Grootboom I*, see Alston & Scott (note 2 above).

110 *Grootboom* note 3 above par [76] and [77] at 81F/G–82C; *TAC* note 4 above par [75] at 749D–F.

111 *Grootboom* note 3 above par [78] at 82C–F/G; *TAC* note 4 above par [77] at 749F/G–G/H.

112 *Grootboom* note 3 above par [79] at 82F/G–H. This finding came in a situation where the parents of these children were manifestly unable to provide them with shelter (the very reason why they approached the Court for help in the first place) and implied that the Court was of the view that the state incurred a duty of care toward children only where they were not physically with their parents or families. With hindsight this can only be described as an unfortunate error on the part of the Court. However, this aspect of the holding in *Grootboom* was clarified in *TAC* (note 4 above par [79] at 750A–B/C) when the Court stated that the state also incurred a duty of care when children were physically with their parents, but their parents were unable to provide them with the requisite care. Presumably the *Grootboom* children were in this position and, again with hindsight, were in fact entitled to receive shelter from the state.

capable of achieving the progressive realisation of the rights in question – it cannot, because it never adequately describes the rights against which reasonableness should be tested. Rather, in the absence of a substantive referent for a proper means-end reasonableness test, the Court asks whether those policies are reasonable simply in the sense that they are rational, coherent, comprehensive, inclusive and so on and so forth. Its concern therefore seems not to be with the possible outcome of government's policies (whether they will actually provide in the basic needs of people) – its concern is whether government acts in a manner consistent with procedural good governance standards in its attempts to realise socio-economic rights.

This conclusion is borne out by an examination of the three judgments. In *Soobramoney*, and *Grootboom*, the Court's actual review¹¹³ clearly was motivated by procedural rather than substantive concerns and in *TAC* those same concerns, although not predominant, loomed large. In *Soobramoney* the only standard used by the Court to evaluate, in terms of section 27(1) and (2), the policy guidelines for admission to the renal dialysis programme and the way it was applied in the applicant's case was a standard of rationality and good faith.¹¹⁴ Perhaps not directly in point, but also significant is the Court's description of the section 27(3) right as no more than a right not to have existing emergency treatment withheld arbitrarily.¹¹⁵ The underlying value that drives the Court's review in both instances is not in the first place the need for access to essential medical treatment, but the good governance standards of rationality and good faith – the Court confines its review to the manner in which the state's policies are conceived and applied, rather than to the question what they are likely to achieve.

The same seems true of *Grootboom*. Despite the fact that the Court's reasonableness policy review standard is potentially a quite strict and substantive standard for government conduct to be tested against,¹¹⁶ in actually applying it in *Grootboom* the Court hardly flexed its muscles, and reached its decision on the basis of the more structural, rather than substantive elements of that test. The Court presented *Grootboom* as a decision based on reasonable inclusivity – government policy was found to be unreasonable because it excluded particularly vulnerable or destitute groups from its scope.¹¹⁷ The Court invalidated the state's housing policy 'to the extent that it fail[ed] to recognise that the State must provide for relief for those in desperate need'¹¹⁸ because 'no provision was made for relief to ... people in desperate need.'¹¹⁹ The Court's order required that the state's housing policy 'must include reasonable measures ... to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations'. This finding of 'unreasonable exclusion' could have meant that some measure of priority concern was owed to desperately poor people, requiring the state to take steps urgently to alleviate their plight. But, as Theunis Roux persuasively points out, this is exactly what is missing from the finding and order: any indication that the

113 Rather than its rhetoric.

114 *Soobramoney* note 2 above par [29] at 776C–D ('A court will be slow to interfere with rational decisions taken in good faith ...').

115 See above text accompanying notes 101–108.

116 See Roux 'Legitimizing Transformation' (note 25 above), arguing that the reasonableness review standard is 'clearly stricter than the rational-basis standard applied under section 9(1) of the 1996 Constitution' and likening the standard to the standard of review applied by the Court in assessing unfair discrimination under s 9(3) of the 1996 Constitution.

117 In *Grootboom* the 'truly homeless' (Judge Dennis Davis's term – see *Grootboom I* note 110 above at 280D/E) and in *TAC* indigent HIV-positive mothers and their newborn children.

118 *Grootboom* note 3 above par [66] at 79D–D/E.

119 *Grootboom* note 3 above par [69] at 80A.

Court's reasonableness standard requires a substantive prioritisation (temporally or otherwise) of effort and expense in favour of those 'living in intolerable conditions or crisis situations'. It is not clear whether it requires anything more substantive of government than to be inclusive – that is, to include in its policies some reference to, or some consideration of the needs of those most desperate. Roux himself puts it as follows:

Although it undoubtedly pushes out the boundaries of socio-economic rights adjudication, the decision falls short of obliging the South African Government to order its spending priorities in any particular way. Rather, the decision is authority for the more limited proposition that socio-economic rights of the kind contained in the South African Constitution may require the diversification of affected policies so as to cater for particularly vulnerable groups.¹²⁰

If this (to my mind entirely plausible) reading of the Court's order is accepted, it becomes clear that the Court's concern in *Grootboom* was quite narrow: it seems to have been concerned in some sense only with the logical consistency of the state's housing policy, the fact that it made no reference to those who had nowhere to live. This is a structural concern only. It did not seem to be concerned with posing a substantive standard, that effort and expenditure should be prioritised in time according to differing degrees of need.¹²¹

In *TAC*, although the reasons for the Court's decision are nowhere stated succinctly, the finding of unconstitutionality seems to have been based on the proposition that government's policy position regarding provision of Nevirapine was not flexible enough to provide for all eventualities and unreasonably excluded indigent HIV-positive mothers and their newborn children outside the pilot sites from access to the drug.¹²² However, on closer inspection it again seems that the standard of rational coherence played an important role in the decision. Discussing government's objections to the safety and efficacy of Nevirapine, the Court makes the following illuminating statement:

The decision by government to provide nevirapine to mothers and infants at the research and training sites is consistent only with government itself being satisfied as to the efficacy and safety of the drug. These sites cater for approximately 10% of all births in the public sector and it is unthinkable that government would gamble with the lives or health of thousands of mothers and infants... . The risk of nevirapine causing harm to infants in the public health sector outside the research and training sites can be no greater than the risk that exists at such a site or where it is administered by medical practitioners in the private sector.¹²³

In this excerpt the Court indicates an evident flaw in the state's argument in *TAC* that runs along the following lines:

120 Roux 'Understanding *Grootboom*' (note 3 above) at 42.

121 This indeed seems to be the way government has interpreted the order in *Grootboom*. By and large the proportions of provincial housing budgets devoted to 'taking account of' the needs of those most desperate have been negligible, almost amounting to simply nominal allocations. In this regard see K Pillay 'Implementation of the *Grootboom* Judgment – Implications for the Right of Access to Adequate Housing' paper presented at the Community Law Centre Colloquium on *Realising socio-economic rights in South Africa: Progress and challenges*, Cape Town (17–19 March 2002). See also Pillay (note 3 above).

122 *TAC* note 4 above par [70] at 748E–F and par [95] at 754F/G–I. See also Bilchitz 'Rights' (note 4 above) at 4.

123 *TAC* note 4 above par [62] at 746E/F–H/I.

- There were no valid concerns about the efficacy and safety of Nevirapine for use in prevention of mother-to-child transmission of HIV at birth – had there been the state would not have used it at the pilot sites in the first place.
- There were no significant cost implications involved in broadening access to Nevirapine.
- The only remaining reason that the state could conceivably advance to restrict the use of Nevirapine to the pilot sites would be the absence of capacity to administer and monitor the use of the drug effectively outside the pilot sites.
- The evidence had shown that significant capacity to administer and monitor the use of the drug did exist outside the pilot sites.
- In this light there was no reason, and it was simply irrational, to refuse to extend the provision of Nevirapine to public health facilities outside the pilot sites where the capacity to administer and monitor the use of the drug did exist.

Against this background it does not seem outlandish to suggest that an important element of the Court's eventual finding in *TAC* was this lack of sense, this simple irrationality in government's policy position. Again, the decision can plausibly be explained as motivated at least partly by concern for the most basic of the structural good governance principles enunciated in the Court's reasonableness test – rational coherence.

III CONCLUSIONS: WHY IT MATTERS

The Constitutional Court's 'flight from substance'¹²⁴ into the arms of procedure exhibited in its adjudication of socio-economic rights is certainly not surprising and, to an extent, understandable.¹²⁵ It would probably be worthwhile to speculate in a separate contribution about the reasons for the Court adopting this thin approach – concerns about its institutional relationship with the political branches of government¹²⁶ bolstered by a formalist understanding of law easily spring to mind as probable suspects – and to evaluate the adequacy of those reasons. However, all that remains for me to do in this essay is to propose some tentative reasons why the Court's retreat into structural good governance standards should be of concern to constitutional scholars. I shall, rather tentatively, advance a number of such reasons.

Firstly, the Constitutional Court's approach is disappointing on an aesthetic, or perhaps a better word is metaphoric, level. The entrenchment of socio-economic rights as fully justifiable rights has long been recognised as one of the most important and most radical innovations in constitutional law introduced by the South African Constitution. Five years ago Karl Klare listed it as one of the features that indicated to him a 'post-liberal' reading of the Constitution – a reading that recognises that 'in sharp contrast to the classical liberal documents, [the South African Constitution] is social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious about its historical setting and transformative

124 I borrow the phrase from James E Flemming 'Constructing the Substantive Constitution' (1993) 72 *Texas LR* 211, who uses it (at 211–214) to describe American constitutionalism's retreat into 'process and original understanding' in reaction to the *Lochner* era. See the sources he refers to at 213, note 12.

125 For an early description of this conservatism, see KE Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146 at 172–188.

126 The influence of this concern in forming the court's jurisprudence is extensively explored by Roux 'Legitimizing Transformation' (note 25 above).

role and mission'. That is, that the South African Constitution is a constitution that aims to transform rather than only to protect, that 'embraces a vision of collective self-determination parallel to (not in place of) its strong vision of individual self-determination.'¹²⁷ His postliberal reading of the Constitution, Klare was quick to point out, is not simply a matter of cosmetic commentary, but poses a definite challenge: 'The Constitution invites a new imagination and self reflection about legal method, analysis and reasoning consistent with its transformative goals ... [and] ... suggests not only the desirability, but the legal necessity, of a transformative conception of adjudicative process and method.'¹²⁸ The Constitutional Court's proceduralist approach to adjudicating socio-economic rights quite poignantly does not rise to this challenge. Indeed, the Court's backslide into the refuge of well-known, settled and 'purely legal' principles of legality and good governance and old distinctions between form and substance (indications of what Klare terms the 'classical legalist methods' prevalent in South African legal culture)¹²⁹ lends credence to Robert Cover's description of the judiciary as the 'jurispathic office'¹³⁰ – another avenue for innovation and renewal in legal thought (this time a particularly promising one) has been significantly clogged.

Secondly, I think the Court's preferred approach has certain definite practical consequences. It limits the potential for the creative use of litigation to effect social change. Sandy Liebenberg recently argued persuasively that the Court's reasonableness policy review approach will have the effect of discouraging people without housing, medical services, food, water or education from approaching the courts for relief on the basis of their socio-economic rights.

This is so in the first place because there will be very little incentive for desperately deprived persons to submit themselves to the arduous legal process if the only relief that can be expected would be general, abstract injunctions to amend policy, rather than direct access to the goods they are lacking.¹³¹

The second reason is that the Court's approach places the burden to persuade it that government policies are unreasonable squarely on the plaintiffs alleging that their constitutional rights have been violated. This means that the plaintiffs (people who appear before the courts because they lack the very basic necessities required to participate in the processes and privileges of society) would have to review government policy related to the issue before the Court at all three spheres of government; would have to point out which resources are available to government to meet the needs that they are litigating for and would have to quantify those resources; and, because of the strong emphasis the Court has placed on the interconnectedness of various constitutional rights, would have to contextualise all of this within the broader social programme of the state, in order to finally persuade

127 Klare (note 125 above) at 153.

128 Klare (note 125 above) at 156. For an even earlier recognition that the adjudication of socio-economic rights, for it to become a viable tool to combat poverty, would require innovations in judicial method and mindset, see De Vos 'Pious Wishes' (note 67 above) at 67–68.

129 Klare (note 125 above) at 156.

130 The full quote runs as follows 'Judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxurious growth of a hundred legal traditions, they assert that this is the one law and destroy the rest.' Robert Cover as cited in R Chanock *The Making of South African Legal Culture 1902–1936: Fear, Favour and Prejudice* (2001) Cambridge: Cambridge University Press. My thanks to Anja Snellman for alerting me to this arresting passage. (Original source Robert Cover 'The Supreme Court 1982 Term – Foreword: Nomos and Narrative' (1983) 97 *Harv LR* 4 at 53.)

131 Liebenberg 'Evolving Jurisprudence' (note 27 above) at 176–177, 190. See also Alston & Scott (note 2 above) at 254–255 for an earlier statement of this same argument.

the Court that the state's policies, so comprehensively viewed, are unreasonable.¹³² This is patently not something that the likely plaintiffs in socio-economic rights cases would be willing, or able for that matter, to engage in.¹³³

There is a third reason why the Court's approach is likely to exercise a chilling effect on socio-economic rights litigation, perhaps more germane to my own analysis. The Court has thus far been fortunate that the three socio-economic rights cases it has been presented with have been relatively easy cases to decide. In *Soobramoney* the outcome of the decision, however the Court reached it, could never have been seriously disputed. In both *Grootboom* and *TAC* the flaws and gaps in the policies that the Court had to review were self-evident, and easily slotted into the Court's preference for structural good governance standards – that is, in both these cases the policies were clearly not rationally coherent and could as such be invalidated by the Court without it in the final instance having to extend itself outside the rationality comfort zone. In addition, in *TAC*, the Court was not even presented with the dilemma of having to invalidate a technically complex policy decision of government – all it was expected to do was to extend an existing policy choice, already made by government, to public health facilities outside the pilot sites.

The problem is that the day will come when the Court is presented with a more difficult socio-economic rights case. This would be a case in which it is presented with a coherent, rational, comprehensive policy that nevertheless substantively affects the realisation of a socio-economic right, and which, were the Court to interfere with it, would have significant budgetary implications. The Court's current focus on rationality and other structural principles of good governance and its steadfast avoidance of the need to describe substantive standards emanating from socio-economic rights will not enable it to deal with such a case – if there is nothing wrong with the structure of the policy, then the Court, using its current approach, would not have anything to say about it.

Perhaps more important: outside of the realm of litigation, the Court's chosen path will potentially limit the wider political impact that socio-economic rights can have on policy formulation and social activism to effect policy change. The socio-economic rights in the Constitution have thus far mostly played a role reactively, used as standards to test policy against once a dispute has arisen. But a potentially much more important role for these rights is

¹³² Ibid.

¹³³ Perhaps one should also mention here that the Court, in adopting its general and abstract reasonableness policy review approach, has scripted for itself a rather complex and wide-ranging role, which, if diligently pursued by the Court, has all the potential to pit it much more directly against the political branches of government, and to require it to dabble much more substantially in technical questions of policy, than a more particularised, rights-based approach would have. Instead of deciding simply whether a particular person or group of persons' rights have been limited, the Court now has to consider and assess the constitutionality of a whole policy programme, and, if it finds such a programme to be deficient, has to order a whole-scale revision of such a programme. Michelman makes a similar point about an equal protection approach to welfare rights as opposed to a basic needs approach. He points out that an understanding of welfare rights that posits a role for courts in the vindication of a state's duty to provide in the basic needs of its people rather than a duty to address the general gap in access to basic resources and amenities is much more sensitive to issues of separation of powers and institutional capacity. As he puts it: 'alleviating specific deprivations is a much more manageable task than closing the general inequality gap to acceptable dimensions' and 'a court solicitous of its own accuracy and credibility should perhaps try to avoid suggesting that its anti-poverty role might go much beyond the alleviation of ... severe deprivations': Michelman 'On Protecting the Poor' (note 7 above) at 8. A related tendency in general societal but also judicial discourse, to describe problems of poverty and deprivation as so entrenched and so unmanageably huge as to excuse societal and judicial helplessness in addressing it has been described by T Ross 'The Rhetoric of Poverty: Their Immorality, Our Helplessness' (1991) 79 *Georgetown LJ* 1499.

that they should guide and shape policy formulation from the outset. This point was recently put persuasively by the Law and Transformation Programme of the Centre for Applied Legal Studies at the University of the Witwatersrand:¹³⁴

[C]onstitutional [socio-economic] rights are not just tools used by lawyers to force government to accede to awkward political demands. Rather, constitutional [socio-economic] rights are policy structuring devices intended to inform the very way government goes about its business. The Constitution itself puts the point in the following terms: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and obligations imposed by it must be fulfilled'. The Constitution does not say that 'South Africa's macro-economic policy is the supreme law of the Republic, and everything the government does must necessarily fall into line with this strategy'. To approach the task of policy formulation ... in this way, would be to betray the ideal of constitutional democratic government.

The Constitutional Court's failure to pose anything other than procedural standards in its adjudication of socio-economic rights limits the effectiveness of these rights as 'policy-structuring devices'. The Court has indicated to government how it should act when formulating and implementing but it has provided very little substantive guidance that can lead policy formulation. This defect obviously also affects the role of civil society organisations and institutions such as the South African Human Rights Commission that seek to influence social policy formulation and implementation.

My last three reasons for concern are theoretical in nature. The Constitutional Court's proceduralist approach to socio-economic rights adjudication is based on the basic assumption that one can distinguish fruitfully between form and substance, or between procedure and content. This distinction is of course inevitably hierarchical and presents a familiar legal strategy: The Court prefers to test 'only' the form of government policies, rather than its content, because testing form ostensibly involves the application of purely legal principles (reasonableness and its subparts) whilst testing content would involve the Court in the perceived morass of (non-legal) political or policy judgments. It is this distinction that makes it possible for the Court to make the following kind of statement, with which *Soobramoney*, *Grootboom* and *TAC* are in fact replete:

A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable.¹³⁵

Debunking precisely this distinction between form (neutral legal principle) and content (subjective political questions) has of course been a major theme of legal scholarship over the last half century.¹³⁶ The distinction is problematic for purposes of this essay for two reasons.

134 Law and Transformation Programme of the Centre for Applied Legal Studies and the University of the Witwatersrand *Comment on the Department of Education's Report to the Minister on a Review of the Financing, Resourcing and Costs of Education in Public Schools* (30 April 2003) at 2–3.

135 *Grootboom* note 3 above par [41] at 68H–69A.

136 The classical text problematising the distinction is of course Duncan Kennedy 'Form and Substance in Private Law Adjudication' (1976) 89 *Harv LR* 1685. For a South African corollary, see A Cockrell 'Substance and Form in the South African Law of Contract' (1992) 109 *SALJ* 40.

First, and most obviously, adopting the distinction between form and content has enabled the Court to divorce itself from the inevitably contested nature of the meaning and role of socio-economic rights and the practical contexts within which they come into play. In short – the Court’s approach has enabled it to deny the inevitably political/substantive policy role it plays in enforcing socio-economic rights and thus to present itself as an impartial regulator rather than active participant. The Court of course says this expressly in all three decisions. In *Soobramoney* the Court was at pains to absolve itself from the responsibility of having to decide the complex moral and political questions underlying Mr Soobramoney’s claim¹³⁷ (in fact, *Soobramoney* can plausibly be described as a decision not to decide). What enabled it to do so was its reliance on what it presented as neutral legal principles of rationality and honesty, which it contrasts to the ‘difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met.’¹³⁸ In *Grootboom* the Court also made it clear that it was not, in making its order or coming to its decision, dabbling in ‘policy’, but applying objective legal principle.¹³⁹ The Court’s attempt to deny its political responsibility perhaps most vividly comes to the fore in *TAC*, in the following illuminating passage:

In our country the issue of HIV/AIDS has for some time been fraught with an unusual degree of political, ideological and emotional contention. This is perhaps unavoidable, having regard to the magnitude of the catastrophe we confront. Nevertheless it is regrettable that some of this contention and emotion has spilt over into this case. Not only does it bedevil future relations between government and non-governmental agencies that will perforce have to join in combating the common enemy, but it could also have rendered the resolution of this case more difficult.

Ultimately, however, we have found it possible to cut through the overlay of contention and arrive at a straightforward and unanimous conclusion.¹⁴⁰

The problem with this stance of the Court is of course not that it in fact manages to duck its political responsibility – that it cannot do. In *Soobramoney*, although the Court presented its decision as a decision not to decide, it did in a very dramatic fashion decide Mr Soobramoney’s fate. In *Grootboom* the Court, although it desperately tried to create the impression that it was not prescribing to government, was in fact doing so. And *TAC* can in no way be divorced from the contentious political atmosphere within which it was decided – the fact is that the Court ended up ordering government to do something which it very much did not want to do.

The real problem with the Court’s professedly apolitical stance is that by pretending not to decide the difficult substantive moral and political questions inevitably involved in its adjudication of socio-economic rights, the Court hides its own predilections – the background political philosophy that in fact informs its judgment – and so insulates them from rigorous evaluation and debate. Consider for a moment the stance that the Court has thus far taken as regards its role in enforcing socio-economic rights from a bird’s-eye view. The Court has

137 *Soobramoney* note 2 above per Chaskalson CJ, par [29] at 776B–C/D and per Sachs J, par [58] at 784C/D–E/F.

138 *Soobramoney* note 2 above par [29] at 776C. See also par [25] at 775C–D.

139 *Grootboom* note 3 above par [41] at 68H–69A.

140 *TAC* note 4 above par [20] and [21] at 735735E/F–H. Henk Botha used this passage as a starting point for his inaugural lecture at the University of South Africa entitled ‘Freedom and Constraint in Constitutional Adjudication’ and drew my attention to its significance.

painted itself as an impartial referee, and no more than that. Its role in enforcing these rights is regulatory only. It must set down the limits within which the real actors (the state, market forces, individuals) may move, but it may not tell them how and where to move within those limits. The central theme in this image of itself is the Court's impartiality, its steadfast refusal to adopt a particular political point of view, or heaven forbid, a particular political philosophy. This impartiality, this description of its position as the only neutral, objective, 'legal' one is of course a myth. Is it merely a coincidence that the role the Court has scripted for itself is a mirror image of the role the state paints for itself in a neoliberal model of government?

DENNIS DAVIS

ELEGY TO TRANSFORMATIVE CONSTITUTIONALISM

I INTRODUCTION

Sound, contemporary constitutional adjudication has to ratify the sense of the contemporary people at large that it's their Constitution (not the judges') that their judicial officers are applying to their lives and affairs.

Frank I Michelman¹

The Constitution speaks of a vision that the society conceiving of it had in mind at the time of its creation. The application of the foundational principles that prefigured this society is likely to change over any significant period of time in that the future members of that society will, in all probability, be confronted by problems and challenges of a kind that could never have been concretely envisaged by their forebears.

The South African Constitution, both in its interim and final forms, was grounded on the desire to change from a society in which racism and sexism divided and ruptured any possibility of a South African community to one where the humanity of each member of the society would be recognised. In this way the possibility of a new South African community could be born. The apartheid society from which the Constitution emerged did not emanate solely from government policy or public power. The struggle against apartheid focused on all forms of power that reinforced white privilege. Writing from his Robin Island prison in the 1970s, Walter Sisulu said: 'Racism serves to perpetuate the privileged existence of the whites. Apartheid which is racism in its most burning form, is founded on and gives expression to this privileged way of life'.² Twenty years later, Madala J captured this idea in his judgment in *Du Plessis v De Klerk*³ when he said: 'The extent of the oppressive measures in South Africa was not confined to government/individual relations, but equally to individual/individual relations.'

My purpose in this paper is to argue that the Constitution responded to all these forms of racism, wheresoever sourced. It sought to render all power accountable to the foundational principles of the Constitution, irrespective of whether that power was sourced in the state or in private hands. Accordingly, the purpose of seeking to constitutionally interrogate the public-

1 Frank I Michelman 'Constitutional Authorship, 'Solomonic Solutions', and the Unoriginalist Mode of Constitutional Interpretation' 1998 *Acta Juridica* 208 at 232.

2 Walter Sisulu 'We shall overcome!' in Mac Maharaj *Reflections in Prison* (2001) 77.

3 1996 (3) SA 850 (CC) par [163].

private divide is vital to the transformative objectives of the Constitution. The legal system, which preferred whites, was not only contained in a series of public law institutions, it also rested upon a conception of private property as a prepolitical, 'natural' phenomenon, which purported to exist independently from the state and the public sphere. It reflected an approach which was deeply rooted in the predominant jurisprudence of our and comparative legal systems.⁴

Were the Constitution to be refused entry to the loci of private power on the basis that power, which was sourced in the hands of private institutions and individuals, represented a private sphere of individual autonomy and sovereignty that not even the state could legitimately invade, much of the apartheid legacy would continue to be immune from the imperative of changing the essentials of apartheid society.

II A FALSE START?

The interim Constitution⁵ appeared to deal with the public-private divide. It provided in section 7(2) that '[t]his Chapter [the Bill of Rights] shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.' On the wording of this section the chapter applied to all law, whether it be public or private law. Not so, said the Constitutional Court. In *Du Plessis v De Klerk*,⁶ De Klerk sued the newspaper and its editors for defamation. Defendant raised a constitutional defence in terms of section 15 of the interim Constitution, the guarantee of freedom of expression. The Court was thus required to answer the question whether the Constitution had horizontal application; that is, could the provision of section 15 apply to a case when two private parties were involved in an action for defamation.

Kentridge AJ adopted the traditional view that 'entrenched bills of rights are ordinarily intended to protect the subject against legislative and executive action'.⁷ He held that the absence of a reference to the judiciary in section 7(1) did not represent an 'oversight'. One of its effects was to 'exclude the equation of a judgment of a court with state action and thus prevent the importation of the American doctrine developed in *Shelley v Kraemer*'.⁸ Kentridge AJ concluded that the Constitution applied to all law but not to all persons so that the common law was only subjected to constitutional scrutiny when governmental acts or omissions in reliance of such law were challenged. In justifying his finding, Kentridge AJ said:

The common law addresses problems with conflicting rights and interests through a system of balancing. Many of these rights and interests are now recorded in the Constitution and, on any view, that means as a result of the terms of the Constitution the balancing process previously undertaken may have to be reconsidered. A claim for defamation, for instance, raises a tension between the right to freedom of expression and the right to dignity. The common-law compromise has been to limit both rights to a certain extent, allowing damages to be recovered for what is regarded as 'unlawful expression' but allowing 'dignity' to be infringed

4 See in general Jennifer Nedelsky *Private Property and the Limits of American Constitutionalism* (1990).

5 The Republic of South Africa Constitution Act 200 of 1993.

6 1996 (5) BCLR 658 CC.

7 At par [45].

8 At par [47].

in circumstances considered to be privileged. Section 33(1) (*the limitation clause*) could hardly be applied to such a situation.⁹

By contrast, Kriegler J found that the Bill of Rights applied in the fashion set out in section 7(2), that is, to all law including any part of the common law relied upon by one party to a dispute, albeit that the state was not involved. Within the zone of autonomy, law did not enter, and the Constitution was inapplicable save for the possible relevance of section 35 (the interpretation clause). The Bill of Rights applied to all law, irrespective of the identity of the parties, but not to all conduct, for there was a range of conduct that was not regulated by law. Kriegler J illustrated this proposition thus:

[Unless] and until there is a resort to law, private individuals are at liberty to conduct their private affairs exactly as they please as far as the fundamental rights and freedoms are concerned. As far as the chapter is concerned, a landlord is free to refuse to let a flat to someone because of race, gender or whatever; a white bigot may refuse to sell property to a person of colour; a social club may black-ball Jews, Catholics or Afrikaners if it so wishes. ... But none of them can invoke the law to enforce or protect their bigotry. One cannot claim rescission of a contract with specific performance thereof if such claim, albeit well founded at common law, infringes a Chapter 3 right. ... The whole gamut of private relationships is left undisturbed.¹⁰

When the Constitutional Assembly came to draft a final Constitution, it made a number of changes to the application clause that appeared to represent an attempt to respond to the majority judgment in *Du Plessis*' case. Section 8(1) of the final Constitution provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. Section 8(2) provides that a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. Section 8(3) provides that when applying the provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court:

- (a) in order to give effect to a right in the Bill, must apply, or where necessary develop, the common law to the extent that legislation does not give effect to that right;
- (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).¹¹

The interpretation of section 8 requires an examination of the concept of horizontality, which has been at the heart of the dispute about the reach of the Bill of Rights. Constitutionally entrenched rights may have an effect upon relations between private persons in a number of ways. These include:

1. Constitutional rights bind private persons and apply to their conduct and form the basis of a cause of action or a defence in litigation in the same way as any other statutory or common law right might well do.

⁹ At par [55].

¹⁰ At par [135].

¹¹ Constitution of the Republic of South Africa, Act 108 of 1996.

2. Constitutional rights bind private persons but effect must be given to such rights by statute or, in the absence of legislation, by a rule of the common law.
3. Constitutional rights do not bind private persons, although the rights apply to all law-governing relations between private persons and thus can form the basis of a challenge to the validity of a statutory, common law or customary law rule that is applicable to private persons.

As is apparent from the judgments of Kentridge AJ and Kriegler J in *Du Plessis*' case, the source of the dispute lies in the distinction between the constitutional regulation of conduct and the regulation of law that may regulate that conduct.¹²

If the conduct of a private person is subjected to constitutional scrutiny, there is direct application of a constitutional right to such conduct. If, however, the conduct of a private person is based on a legal rule, which itself can be subjected to constitutional scrutiny, it can then be said that the Constitution applies indirectly to this conduct.

There is comparative authority for this distinction. Certain jurisdictions recognise the situation where constitutional rights apply to the conduct of private persons and hence form the source of a cause of action. In the German Basic Law, the right of association to improve working conditions in article 9(3) confers a cause of action on private persons.¹³ In *38 B Verf G E 386* (1975) (the lockout case) a trade union sued an employer on the basis of a breach of article 9(3) for refusing to reinstate workers as council members after a strike and a lockout, thereby implying that article 9(3) provided an independent cause of action in a dispute between two private parties. Similarly, in *Attorney General (SPUC) (Ireland) LTD v Open Door Counseling Ltd*,¹⁴ the Irish Supreme Court upheld a High Court decision interdicting a counselling service from assisting pregnant women to obtain an abortion outside the jurisdiction of Ireland on the grounds that this constituted conduct in breach of article 40.3.3 of the Irish Constitution which guarantees the right to life of the unborn child.

Recently, the Ontario Superior Court of Justice in *Hall (litigation guardian of) v Powers*,¹⁵ found that a school that had refused to allow a male pupil to bring his boyfriend to the school prom had breached the pupil's constitutional right to equality. Although the inquiry did not focus upon the application question in that the Court found that the school had exceeded its powers under the applicable legislation, this kind of dispute, particularly in the case of a private school, would constitute a conduct dispute to which section 8(2) was particularly designed.

The South African constitutional text regulates the conduct of private persons indirectly. It seeks to do so through the medium of an intermediate legal rule, whether sourced in statute or the common law. In this way, the relevant statute or common law mediates the constitutional right that applies to the dispute between private persons. The constitutional right applies to the law that regulates the private conduct. Viewed thus, the structure of section 8 is not based upon the doctrine of direct horizontal application as I have sought to define it.

In summary I would advocate the following general approach to section 8: Section 8(1) states that the Bill of Rights 'applies to all law'. This is an unambiguous statement that seeks to

12 See as an example of this controversy DM Davis & MH Cheadle 'The Application of the 1996 Constitution in the Private Sphere' 1997 (13) *SAJHR* 44; N Sprigman & M Osborne 'Du Plessis is not Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes' 1999 (15) *SAJHR* 25.

13 See Donald Kommers *Constitutional jurisprudence of the Federal Republic of Germany* (1997) 272–273.

14 [1988] IR 493. See also Casey *Constitutional Law in Ireland* (1992) 309–310.

15 Unreported judgment delivered on 10 May 2002.

ensure that all law, including legislation, the common law and customary law, fall under the application and scope of the Bill of Rights. It means that any law, irrespective of its source, may be constitutionally challenged, irrespective of the identity of the litigating parties. This unambiguous formulation of section 8(1) provides no support for the attempt to distinguish between a common-law rule where the defendant in the litigation is the state and litigation between private parties where the same common law lies at the source of the dispute.¹⁶

Section 8(2) extends the scope of the Bill of Rights to the exercise of private power. It provides that a provision of the Bill of Rights binds natural and juristic persons, if and to the extent that it is applicable, taking into account the nature of the right and of any duty imposed by the right. It is therefore a qualified provision in that it does not extend the reach of the Bill of Rights to every dispute between private persons. The Bill of Rights will only bind the parties where the right sought to be invoked is applicable to the dispute between the parties. In the determination of the 'applicability question' the Court must take account of the nature of the right and any duty imposed by such right. If the enquiry indicates that the relevant constitutional provision binds private parties, section 8(3) requires that effect be given to the right, whether by legislation or the common law. If there is no legislation or common-law rule giving effect to this constitutional right, the Court is mandated to develop a rule to 'fill the gap'. In formulating the rule, a court may develop the rule in such a way that the constitutional right is limited provided that its proposed limitation falls within the scope of section 36, the general limitations clause.

The key to the Bill of Rights binding private persons is to be found in the words 'to the extent that it is applicable'. The *Shorter Oxford English Dictionary* defines 'applicable' as 'being capable of being applied; having reference; fit or suitable'. The court is required by the section to engage with the question as to whether, within the context of the facts of the dispute, the right invoked by a litigating party is capable of being applied to a private relationship. Certain rights do not appear to admit of application to private persons such as the rights of arrested or accused persons as set out in section 35 of the Constitution.

Having decided that the right is capable of being applied, a second question arises, namely whether the court considers it suitable to apply the constitutional right to a private relationship. Here the court inquires into the impact of imposing a duty on the private litigant in the context of the dispute. The value-laden nature of this second enquiry mandates an engagement with the foundational constitutional values in order to determine 'suitability'. As Clapham writes:

Where the right involved (the right against private persons) is justified by the goal of democracy there has to be a public element in order to justify protection of the right. But where the right can be justified by an appeal to dignity, we do not need such a public element and consequently the right must always be protected. This could be formulated as a duty based theory. Individuals or private bodies have a duty not to subject others to indignities, and have a further public duty not to thwart the collective good of democracy where this is threatened.¹⁷

16 See by contrast De Waal, Currie & Erasmus *The Bill of Rights Handbook 2001* (2001) who emphasise that, where Kentridge AJ placed emphasis in *Du Plessis*' case on the absence of a reference to the judiciary in section 7(1) as being designed 'to exclude the equation of a judgment of a Court to State action and thus prevent the application of this American doctrine developed in *Shelley v Kraemer*, section 8(1) specifically includes within its formulation the judiciary.

17 A Clapham *Human Rights in the Private Sector* (1993) 146.

Once the court has decided in terms of section 8(2) that a provision of the Bill of Rights applies to a natural or juristic person, section 8(3) comes into effect. This section contemplates the following process:

- (a) The court must determine whether there is any legislation giving effect to the right. If so, the reach of the Constitution into the exercise of the private relationship is regulated through this legislation.
- (b) Absent applicable legislation, the court determines whether there is a common-law principle that gives effect to the constitutional right. If there is, this common-law principle governs the relationship between the parties and the Constitution's reach will be regulated through that principle of the common law.
- (c) In the absence of any applicable legislation or principle of common law, the court is required to develop a rule of common law. The phrase 'to develop' in the *Shorter Oxford English Dictionary* means 'unfold, reveal or be revealed, bring or come from latent, make to active or visible state, make or become known, make or fuller more elaborate or systematic or bigger'.

This developmental task of the courts is no different from the manner in which courts have traditionally developed the common law; that is prior to the existence of the Constitution. As Chief Justice Corbett observed:

the policy decisions of [the] courts which shape and, at times, refashion the common law must also reflect the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people. A community has certain common values and norms. ... It is these values and norms that the judge must apply in making his decision. And in doing so he must become 'the living voice of the people'; ... he must interpret society to itself.¹⁸

III HOPE OF TRANSFORMATION DASHED?

In *Khumalo v Holomisa*¹⁹ the Constitutional Court was granted its first opportunity to interpret the meaning of section 8. The respondent, a well-known South African politician and leader of a political party, sued applicants for defamation arising from the publication of an article in a newspaper. In the article, it was stated that respondent was involved in a gang of bank robbers and that he was under police investigation for this involvement. Applicants excepted to the respondent's particulars of claim. They contended that the contents of the statement were matters in the public interest, and that failure by respondent to allege in his particulars of claim that the statement was false rendered the claim excipiable in that it failed to disclose a cause of action. This exception was based upon the direct application of section 16 of the Constitution which enshrines the constitutional guarantee of freedom of expression. In the alternative applicants averred that the terms of the common law should be developed to promote the spirit and objects of the Bill of Rights in such a manner as to justify the exception.

In seeking to justify their reliance on section 16 of the Constitution applicants argued that, because section 8(1) provided that the Bill of Rights applied to all law and bound the judiciary,

18 MM Corbett 'Aspects of the Role of Policy in the Evolution of our Common Law' 1987 (104) *SALJ* 52 at 67.

19 2002 8 BCLR 771 (CC).

section 16 was required to be interpreted so as to ensure direct application to the common law of defamation. Hence applicants sought to distinguish the decision of the majority in *Du Plessis v De Klerk* on the basis that the latter case had been based upon the provisions of the interim Constitution which were not directly binding on the judiciary. The wording of the comparable provision had been expressly altered in the final Constitution.

In rejecting applicants' argument, O'Regan J said:

It is clear from sections 8(1) and (2) of the Constitution that the Constitution distinguishes between two categories of persons and institutions bound by the Bill of Rights. Section 8(1) binds the legislature, executive, judiciary and all organs of State without qualification to the terms of the Bill of Rights. Section 8(2) however provides that natural and juristic persons shall be bound by provisions of the Bill of Rights 'to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'. Once it has been determined that a natural person is bound by a particular provision of the Bill of Rights, section 8(3) then provides that a court must apply and if necessary develop the common law to the extent that legislation does not give effect to the right. Moreover, it provides that the rules of the common law may be developed so as to limit a right, as long as that limitation would be consistent with the provisions of section 8(3)(b).

Were the applicants' argument to be correct, it would be hard to give a purpose to section 8(3) of the Constitution. For if the effect of sections 8(1) and (2) read together were to be that the common law in all circumstances would fall within the direct application of the Constitution, section 8(3) would have no apparent purpose. We cannot adopt an interpretation which would render the provision of the Constitution to be without any apparent purpose.²⁰

O'Regan J continued that applicants were members of the media who had been identified specifically as bearers of constitutional rights, particularly freedom of expression. Accordingly,

there can be no doubt that the law of defamation does affect the right to freedom of expression. Given the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the State or organs of State, it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by section 8(2) of the Constitution. The first question we need then to determine is whether the common law of defamation unjustifiably limits that right. If it does, it will be necessary to develop the common law in the manner contemplated by section 8(3) of the Constitution.²¹

The Court then turned its attention to the common law of defamation and in particular to the latest offering on the subject by the Supreme Court of Appeal in *National Media Ltd v Bogoshi*.²² In that case Hefer JA (as he then was) said the following:

The publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish particular facts in the particular way and at the particular time.

²⁰ At par [31]–[32].

²¹ At par [33].

²² 1998 (4) SA 1196 (SCA).

In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance, that greater latitude is usually allowed in respect of political discussion ... and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently, is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in the newspaper.²³

O'Regan J found that the test in *Bogoshi* was congruent with section 16 of the Constitution. It allowed the publisher who could establish truth in the public benefit to do so and avoid liability for defamation. If a publisher could not establish truth, it could still show that in all the circumstances the publication was reasonable. In a determination of whether the publication was reasonable the Court would have regard to the individual's interest in protecting his or her reputation as well as that individual's interest in privacy. She then said:

In that regard, there can be no doubt that persons in public office have a diminished right to privacy, though of course their right to dignity persists. It will also have regard to the crucial role played by the press in fostering a transparent and open democracy. The defence of reasonable publication avoids therefore a winner-takes-all result and establishes a proper balance between freedom of expression and the value of human dignity.²⁴

To the extent that the Court was prepared to accept that section 16 applied to the dispute between the parties in the *Holomisa* case, it must be taken to have advanced the cause of horizontal application beyond that which was set out by the majority in *Du Plessis v De Klerk*. But the Court did not reject the approach adopted in *Du Plessis* in its entirety. The general application clause, section 8(1), which provides that the Bill of Rights applies to 'all law', is given a similar interpretation in *Holomisa* to that which was adopted in *Du Plessis*' case. 'All law' means all law as it pertains to any dispute in which the state is involved. Absent the state as a litigant, section 8(1) has no application and the inquiry then turns on whether the particular provision of the Bill of Rights, upon which a private party relies, is applicable to the dispute in question.

The judgment therefore maintains the division between the Constitution as it applies to law where the state is involved and to law where the state has no involvement. As in the case of the majority judgment of Kentridge AJ in *Du Plessis*' case, the Court in *Holomisa* conflates the direct application of constitutional rights to the conduct of private persons with constitutional application to law where the law governs the conduct of private persons. By contrast, the argument of this paper is that where it is contended that the conduct of private persons infringes a provision of the Constitution, direct application only is applicable where the constitutional right itself constitutes the cause of action or justifies the defence. In the case where the dispute turns on the breach of a statutory or common-law rule, the only constitutional matter that arises will be whether the statutory or common-law rule fails to give proper

23 At 1212G–1213A.

24 At par [43].

effect to the constitutional right in question. These models of constitutional adjudication differ and section 8(2) and 8(3) of the Constitution were introduced to deal with the former case.

IV CONCLUSION

It may be argued that the result in the *Holomisa* case would have been no different had the Court interrogated the rule in *Bogoshi* in terms of a section 8(1) enquiry. Indeed it may also be argued that the result could have been similarly achieved by way of the interpretation clause, section 39(2).

It is important, however, not to be blinded by a result in a particular dispute. The judgment in *Holomisa* gives a particular interpretation to the phrase ‘all law’; one which ignores the plain meaning of the words ‘all law’. The reason for moving from the plain meaning can be found in the approach adopted in the *Holomisa* case that is predicated on an insistence that there should be a clear divide between public and private law. There is a resistance to a constitutional project that would insist that the entire body of South African law should be subjected to a mandatory investigation as to whether the principles thereof are congruent with the foundational commitments of the Constitution. The interpretation in the *Holomisa* case is one that maintains a conceptual divide between the public and private and thereby weakens the level of accountability of private power through constitutional scrutiny.

One searches in vain in the judgment of O’Regan J for any clear articulation of the scope and meaning of the freedom of expression guarantee as enshrined in section 16. Instead the common law of defamation is examined as a first stage of the enquiry. The Court then finds that the test as set out in *Bogoshi* represents an adequate balance between the rights of freedom of expression, dignity and privacy. That finding is formulated in an assertion, rather than a conclusion that follows upon a careful comparison between the scopes of freedom of expression as contained in section 16 and set out in a detailed enquiry with that of the scope and meaning of the *Bogoshi* test. It appears that the common law drives the enquiry into constitutional values rather than the converse, which should be the case if section 8(1) were to be applied to a private dispute based upon existing common-law rules.

Neither would recourse to section 39(2) necessarily still this criticism. Although the result may have been similar, section 39(2) should not be employed to get the Court off its narrow legal hook. As Kriegler J noted in *Du Plessis*, section 39(2) serves a different (albeit occasionally overlapping) purpose. Where there is no claim of unconstitutionality involving a rule of common or customary law, a court is still bound to have regard to the spirit and objects of the Constitution. Where no right in chapter 2 can be invoked the spirit and objects of the Constitution are still to be considered in the interpretation and development of the common law.²⁵ On the basis of the argument of this paper, section 8 should not be shackled by a preconstitutional interpretation of the public/private divide with the plea in mitigation that section 39(2) may yet do the job in a particular case.

After the controversy relating to the decision in *Du Plessis v De Klerk* and the stronger textual support for the kind of horizontal application as urged in this paper and as contained in section 8 of the final Constitution, it was to be hoped that the jurisprudence which flowed from section 8 would involve the kind of process of mapping and criticism which Roberto Unger has

²⁵ *Du Plessis* par [142].

urged as being important to the practice of legal analysis as institutional imagination. As he writes:

Mapping is the attempt to describe in detail the legally defined institutional micro-structure of society in relation to its legally articulated ideals. Call the second moment of this analytical practice criticism: the revised version of what the rationalistic jurists deride as the turning of legal analysis into ideological conflict. Its task is to explore the interplay between the detailed institutional arrangements of society as represented in law, and the professed ideals or programmes as these arrangements illustrate and make real.²⁶

Section 8(1) mandated a similar process of enquiry. It required that our courts explore the detailed legal arrangements of society whether sourced in public or in private law and then to compare the professed ideals and principles contained in the Constitution and its core values with these legal arrangements of society, particularly as they had been developed until the passing of the Constitution. The Constitution was designed to look forward to a society in the 'becoming'. The process of the interrogation of all the conceptual and legal baggage which had been encrusted upon societal arrangements during three hundred years of non-constitutional rule promised a jurisprudential investigation and, if necessary, conceptual legal change in order to facilitate this process of a society in its 'becoming'.

In its first challenge in seeking to give this kind of content to section 8 of the Constitution, the Court has again failed the very aspirations that saturate the constitutional text. Instead of locating a constitutional text in the future, it has constrained the interpretation thereof by the exclusive use of the conceptual tools of the past.

26 Roberto Unger 'Legal Analysis as Institutional Imagination' 1996 (59) *Modern LR* 1 at 20.

LOURENS DU PLESSIS

SOME OF FRANK MICHELMAN'S PROSPECTS FOR CONSTITUTIONAL INTERPRETATION IN SOUTH AFRICA – IN RETROSPECT

I THE (MODEST) AIMS AND THE PURPORT OF THIS CONTRIBUTION

I was asked 'to write something about Frank Michelman's views on constitutional interpretation'. It becomes anyone complying with such a request to set modest goals, since virtually all the products of our laureate's prolific pen somehow deal with constitutional interpretation. I intend to test-drive some of Michelman's prominent ideas on constitutional interpretation on constitutional roads in the South African context. A transcript of his introductory address during a seminar of the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand (hereinafter referred to as 'the CALS address')¹ will guide me in the identification of these ideas. The said seminar took place from 23 to 25 January 1995 and was organised to discuss critical issues relating to the Bill of Rights (Chapter 3) in South Africa's transitional Constitution.² In his address Michelman, anticipating the advent of constitutional jurisprudence in South Africa, made a number of significant observations that are worth revisiting now, more than eight years later.³ The CALS address consists of two parts:

In the first part Michelman responds to a request to discuss 'constitution adjudicative method'⁴ by considering the judiciary's 'political' role in constitutional adjudication. His observations are informed with notions of (his understanding of) civic republicanism – as spelled out more fully in an impressive array of (other) writings. In the second part of his address Michelman assesses some 'interpretative approaches or methods available to con-

1 The transcript CALS address was published as 'A Constitutional Conversation with Professor Frank Michelman' in (1995) 11 *SAJHR* 477-485.

2 Constitution of the Republic of South Africa, Act 200 of 1993.

3 In a sense the CALS address is Michelman's most modest contribution about constitutional interpretation in and with reference to the South African context – but it is certainly not the least interesting and when related to some of his other writings on civic republicanism it actually becomes (as I hope to show) a fascinating text.

The following are Michelman's other writings on (aspects of) constitutional interpretation in and with reference to the South African context: Frank I Michelman 'Constitutional Authorship, 'Solomonic Solutions', and the Unoriginalist Mode of Constitutional Interpretation' 1998 *Acta Juridica* 208-234 (originally presented as a paper at a conference *Doing Things with Words*, hosted by the Faculty of Law at the Rand Afrikaans University from 1-3 September 1997); 'The Constitution, Social Rights and Reason: A Tribute to Etienne Mureinik' (1998) 14 *SAJHR* 499-507; 'Postmodernism, Proceduralism, and Constitutional Justice: A Comment on Van der Walt and Botha' (2002) 9 *Constellations* 246-262.

4 Michelman (note 1 above) 477.

stitution adjudicators⁵ concluding that these approaches or methods do not necessarily exclude one another and that in actual fact there is no template approach or method shaping all others.

In the first part of my essay I shall deal with the significance of aspects of Michelman's version of civic republicanism for constitutional interpretation in South Africa, focusing on themes and examples from South Africa's constitutional case law. In the second (much shorter) part I shall assess Michelman's claims about approaches or methods available to constitution adjudicators with reference to South African experiences in the fields of both statutory and (especially since 1995) constitutional interpretation.

II CIVIC REPUBLICANISM AND CONSTITUTIONAL INTERPRETATION IN SOUTH AFRICA

For the road tests in the first section of this essay I prefer to travel (constitutional) roads less travelled, in other words, roads along which

- unusual, 'irregular' or even idiosyncratic (constitutional) issues are calling for solution, and/or
- workable yet unconventional (constitutional) arguments – challenging and seeking to break the mould of orthodoxies in adjudicative reasoning 'as it stands' – are carved out.

Michelman is a creative, articulate and regular user of these roads, well aware of both the strengths of and limitations to scholarly discourse. Even if he drives home a point categorically (for example: '[T]he Court is, vis-à-vis the people, irredeemably an undemocratic institution.'⁶) nuanced postulates lie behind his forceful contention(s).⁷ His scholarly sophistication allows him to be comfortable with inchoate theories (as, for instance, his 'theory' of social justice⁸) thereby steering clear of essentialist assumptions about 'universal truths'. In doing so, he calls to attention the inherent provisionality of theories as representations and explanations of whatever we (scholars and others) profess to know.⁹ This complicates matters for anyone trying to establish Michelman's 'definite view(s)' on a particular issue or issues, but it also means that he releases his insightful thinking with no strings attached – not simply 'to be followed', but rather to be test-driven ... along uncharted roads.

Roads less travelled can only be reached via conventional roads. Preference for test-driving excursions along the former therefore does not preclude the use of the latter. It is apparent from Michelman's writings that he realises this. He is not at all reluctant to reveal his appreciation for many of the tested and tried tenets of (classically) liberal constitutionalism, but this appreciation does not keep him from proceeding beyond these tenets in an attempt to redress their shortcomings – and in quest of alternatives.

5 Ibid 482.

6 Frank I Michelman 'The Supreme Court, 1985 Term – Foreword: Traces of Self-Government' (1986) 100 *Harvard LR* 4-77 16.

7 In the example just referred to, it is Michelman's version of civic republicanism (as will be explained below) that underlies this seemingly conclusive averment.

8 See the essay of AJ van der Walt 'A South African Reading of Frank Michelman's Theory of Social Justice' elsewhere in this volume and the writings of Michelman referred to in footnotes 80–82 of that contribution.

9 I can fully associate myself with Van der Walt's expression of appreciation for such an approach (see footnote 32 of his contribution).

(a) Constitutional Adjudication: A Political Responsibility

In the CALS address Michelman argues for a distinction, first, between what the Constitution means and what judges say it means.¹⁰ He thereby highlights the reality of judicial leadership in constitutional interpretation. This leadership, according to him, is no sad truth – and indeed commands respect. But a second distinction between analytical jurisprudence and political argument then becomes necessary, so as to keep the former from colonising the latter.¹¹ There are constitutional claims that do not necessarily present themselves as justiciable rights, just as there are constitutional obligations that are not automatically a foil for specific constitutional rights.¹² However, this is a far cry from claiming that law and politics exist separately. Analytical jurisprudence and political argument have to be distinguished not to purge the former of political content, but to honour the authenticity of the latter as a distinctive mode of constitutional discourse. (This line of argumentation, by the way, allows for a needs-based conception of citizens' socio-economic entitlements vis-à-vis the state.¹³) Michelman speaks appreciatively of the socially transformative character of South Africa's (transitional) Constitution, pleads for judicial involvement in charting the course of a transformation that is (also) irrevocably political in nature, and emphasises the 'tight connections among legal, political, and social justice'.¹⁴ He is, in other words, not contending for a minimalist, libertarian and individualistic mode of constitutional adjudication that upholds rigid boundaries between individuals and the collective, and that sharply contrasts constitutional review as judicial doing and 'democratic' law-making as primarily the business of elected legislatures. He argues for a fuller, communitarian frame of mind instead, recognising an entwinement of (rather than counterpoising) individual and collective identities and interests.¹⁵ This is the mindset of Aristotle's *zoön politikon* (a 'political animal' or 'creature') who, with some wisdom of hindsight, could well be thought of as a citizen of a modern-day civic republic too.

(b) The *Zoön Politikon* as Civic Humanist

Civic humanism is not particularly modern. Hendrik Botha¹⁶ traces it back 'to ancient Greek and Roman political thought' and, to be more exact, to Aristotle's belief 'that the citizen [read: *zoön politikon*] could come to self-realisation only through active participation in the life of the polis'. The citizen is, in other words, inevitably a civic being or *civic humanist* capable of displaying civic virtue, that is, a willingness to subordinate private interests to the general

10 Michelman (note 1 above) 481.

11 In my exploration of the idea that analytical jurisprudence should be kept from colonising political argument (see e.g. sections II(c)(ii), II(d)(i) and II(d)(ii) below), I go beyond examples and instances Michelman raises in the CALS paper – with apology to our laureate if my attempted extension of his idea amounts to its unintended distortion.

12 Michelman (note 1 above) 481.

13 See Van der Walt (note 8 above).

14 Michelman (note 1 above) 478.

15 H Botha 'Democracy and Rights: Constitutional Interpretation in a Postrealist World' (2000) 63 *THRHR* 561–581, 562–563.

16 H Botha *The Legitimacy of Law and the Politics of Legitimacy: Beyond a Constitutional Culture of Justification* LLD Thesis (1998) 115 footnote 3.

good.¹⁷ Modern(ist) versions of civic humanism – kick-started by (amongst others) early fifteenth century Florentine republicanism¹⁸ and the contributions of individual thinkers (among whom, especially in the English-speaking world, James Harrington¹⁹ is prominent) – contest (classical) laissez-faire liberalism's faith in an autonomous individual who²⁰

- is by nature individualistic and egocentric and does things because she or he expects reward;
- is but a component part of a society that she or he constitutes together with (other) individuals, in such a manner that 'the whole' can be understood with reference to any of its individual components;
- is rational and does not act merely instinctively – and thanks the restraint of her/his greed to an appropriate 'upbringing';
- willingly defers to the 'invisible hand' of market forces; and
- recognises the necessary 'evil' of social control that, in its turn, has to be reined in pursuant to a notion of 'constitutionalism' that accepts the necessity of both government and limited government.

The mode of politics just described assumes 'that societal organization should turn upon a minimal conception of the good' – hence the confidence that a procedurally neutral version of constitutionalism will allow individuals to work things out for themselves and to give effect to their own ('fuller') conception of the good.²¹ Civic republicanism claims that political discourse is conditioned by the common meanings and traditions within a political community and cannot subscribe to the notion of a freely choosing individual, visualising her or his personhood with no reference to her or his role as citizen.²² In response to classical liberalism's (over)emphasis on individual self-interest civic republicans maintain that politics is necessary 'for the growth, development and fulfilment of personal life':

They consider politics to be the public debate in which common public interests and virtues are articulated and believe that the state may legitimately promote these interests and virtues.²³

Furthermore, in contradistinction to liberalism's (positivist) understanding of law as a necessary evil, civic humanism sees law as 'constitutive of culture' and as a means for the fulfilment of the 'deepest aspirations' of both individuals and communities.²⁴ This 'positive' and even optimistic (normative) perception of the law is not, however, in any way derived from a natural-law type of thinking.²⁵

17 FI Michelman (note 6 above) 18.

18 Botha (note 16 above) 121.

19 Ibid 131–134. Michelman (note 6 above) 36–55 assigns considerable weight to Harrington's contribution as historical source of civic republican thinking in the USA.

20 HK Girvetz *The Evolution of Liberalism* (1963) 27–136; H Kotzé *Judisiële Aktivisme in Suid-Afrika* (1992) 96–115; LM du Plessis 'Conceptualising "Law" and "Justice" (2): Just Legal Institutions in an optimally Just Society' (1992) 3(3) *Stell LR* 357–374, 359–360. Also see JWG van der Walt *The Twilight of Legal Subjectivity: Towards a Deconstructive Republican Theory of Law* LLD Thesis (1995) 355.

21 Van der Walt (note 20 above) 406–407.

22 Ibid 407.

23 Ibid 407.

24 MJ Horwitz 'Republicanism and Liberalism in American Constitutional Thought' (1987) 29 *William and Mary LR* 57–74, 73–74.

25 Van der Walt (note 20 above) 407.

Michelman says the following about (civic) republicanism in American constitutional thought:

Republicanism is not a well-defined historical doctrine. As a 'tradition' in political thought, it figures less as canon than ethos, less as blueprint than as conceptual grid, less as settled institutional fact than as semantic field for normative debate and constructive imagination.²⁶

This is the Michelman wary of essentialist claims speaking²⁷ – the scholar averse to universal truth claims and alert to the inherent provisionality of any theory. And yet it cannot be denied that civic humanism is a major formative force in his thinking²⁸ – so much so that it is impossible, within the confines of this essay, fully to explain why (and how) this is the case. For present purposes only one aspect of Michelman's 'republicanist endeavour' will be considered, namely how he seeks to avoid the criticism that civic republicanism ('an obnoxiously solidaristic social doctrine'²⁹) is prone to coercive communitarian (and, eventually, majoritarian and state) absolutism.³⁰ He is adamant that 'negative pluralism' – premised on the belief that a fundamental subjectivity of values excludes the forging of a public conception of the good through mutual persuasion – cannot allay fears of communitarian absolutism:

I mean by [negative] pluralism the deep mistrust of people's capacities to communicate *persuasively* to one another their diverse normative experiences ...³¹

Michelman seeks to counter negative pluralism with an 'articulation of the common good ... as a response to otherness'.³² According to him American constitutionalism rests on two premises regarding political freedom:

first, that the American people are politically free inasmuch as they are governed by themselves collectively, and, second that the American people are politically free inasmuch as they are governed by laws and not men.³³

The question is how to think of self-rule and law-rule as amounting to the same thing.³⁴ This will apparently be possible when politics is conceived of as a process in which 'men' become public-regarding citizens and thereby members of a people:

It would be by virtue of that people-making quality that the process would confer upon its law-like issue the character of law binding upon all as self-given. A political process having

26 Michelman (note 6 above) 17.

27 See above.

28 See e.g. Michelman (note 6 above) 16-36.

29 Frank I Michelman 'Law's Republic' (1988) 97 *Yale LJ* 1493-1537 1496.

30 JWG van der Walt 'The Critique of Subjectivism and its Implications for Property Law – Towards a Deconstructive Republican Theory of Property' in GE van Maanen & AJ van der Walt (eds) *Property Law on the Threshold of the 21st Century* (1996) 115–159, 149; see also Michelman (note 29 above) 1495. Botha (note 15 above) 563 and 571–572 points to the 'authoritarian implications' of the civic republican project as well as its overambitious expectation that, in contemporary democracies with their lack of community, it may be possible to 'forge a link between the ideal of a self-governing political community and existing institutions'.

31 Michelman (note 29 above) 1507. Michelman does recognise a 'positive pluralism' too, that is one that accepts and celebrates diversity within a society.

32 Van der Walt (note 30 above) 149.

33 Michelman (note 29 above) 1499–1500.

34 *Ibid* 1501.

such a quality is ... jurisgenerative ... imbuing its legislative product with a 'sense of validity' as 'our' law.³⁵

Faced with the reality of plurality³⁶

a political process can validate a self-given law only if (i) participation in the process results in some shift or adjustment in relevant understandings of some (or all) participants, and (ii) there exists a set of prescriptive social and procedural conditions such that one's undergoing, under those conditions, such a dialogic modulation of one's understandings is not considered or experienced as coercive, or invasive, or otherwise a violation of one's identity or freedom, and (iii) those conditions actually prevailed in the process supposed to be jurisgenerative.³⁷

Michelman realises and admits that stipulation (ii) is problematic, but he argues that (ii) does not necessarily require the full dissolution of both rational and passionate disagreements resulting from differences in perspective. 'Dialogic modulation' could make it possible for ('opposing') participants in the dialogue, rather than to abandon their commitments, to come to hold the same commitment in a new way.³⁸ Stipulation (ii) is not a self-sufficient assertion about actual experience(s) or even about what will actually be possible. It is rather a *working hypothesis* or, in Michelman's own words, 'an inference about what we have to regard as possible as long as we do not give up the historic American idea of constitutionalism'.³⁹

Michelman's *zoön politikon* has no 'closed identity': she or he is not at the mercy of abstract ideas about what it means to be a citizen with precisely categorised entitlements or rights.⁴⁰ She or he is, in line with what stipulation (ii) describes, an active participant in

a process of personal self-revision under social-dialogic stimulation ... a self whose identity and freedom consist, in part, in its capacity for reflexively critical reconsideration of the ends and commitments that it already has and that make it who it is. Such a self necessarily obtains its self-critical resources from, and tests its current understandings against, understandings from beyond its own pre-critical life and experience, which is to say communicatively, by reaching for the perspectives of other and different persons.⁴¹

Michelman's observations about constitutional interpretation in his CALS address can be assessed with reference to this profile sketch of the *zoön politikon* (or 'civic human'). It is clear now why Michelman maintains that analytical jurisprudence should not be allowed to demarcate political discourse: political discourse, constituting the civic selfhood of the citizen as it were, cannot be captured in (let alone be reduced to) abstract legal categories deducible from the constitutional (or, for that matter, any other legal) text. By the same token citizens' claims or entitlements do not simply translate into justiciable and enforceable constitutional rights. Adjudicative, constitutional(ist) rights-discourse and judicial action concretising constitutional expectations may well be essential social-dialogic circumstances constituting civic selfhood, but there are citizens' claims and entitlements (and needs) whose fulfilment does not

35 Ibid 1502.

36 Unfortunately Michelman does not specify whether it is positive or negative plurality – but it is probably the latter.

37 Michelman (note 29 above) 1526-1527.

38 Ibid 1527.

39 Ibid 1528.

40 Van der Walt (note 30 above) 151.

41 Michelman (note 29 above) 1528.

depend only on such discourse and action. Constitutional rights discourse is inevitably political, but not all political discourse is about constitutional rights. To reduce civic dialogue to constitution-speak and, in particular, rights-speak, is to overstrain the Constitution – to turn the nation's highest law into an overarching, all-encompassing super law.⁴² Judges and courts are moreover not the Republic's soothsayers in constitutional or any other matters, and their leadership in constitutional interpretation does not authorise them to cast (adjudicative) self-restraint to the winds.

***(c) Civic Republicanism and the Business of Adjudication:
Two Practical Examples***

In his two major articles on civic republicanism⁴³ Michelman develops his ideas with reference to judgments of the US Supreme Court in two cases where unusual or 'irregular' issues stood to be resolved. It will be worthwhile briefly to point out how, in Michelman's view, the (constitutional) issues calling for solution in these two cases create room for plausible civic republican reasoning (even though the Supreme Court judges, by and large, did not adhere to such reasoning).

(i) *Goldman v Weinberger*⁴⁴

Simcha Goldman, an orthodox Jew and ordained rabbi, was a commissioned officer in the US Air Force doing active service as a uniformed clinical psychologist. For many years he wore a yarmulke on duty without any difficulty, but then an overconscientious commanding officer, professing to invoke military dress regulations, ordered him to stop wearing his yarmulke on duty and threatened him with all sorts of action should he fail to comply. Relying on the guarantee of religious freedom in the US Constitution's First Amendment Goldman resorted to constitutional litigation (against the secretary of defence and others) and claimed relief for a violation of his right to religious liberty.

According to Michelman the controversy in *Goldman* raises 'the problem of legal imperialism and especially its relation to personal freedom and self-government'.⁴⁵ The Supreme Court was sharply divided in this case not so much because it found against Goldman with but a 3-2 majority, but more so because in its reasoning the five judges adopted decidedly dissimilar (and diverse) strategies to negotiate the polarity of universe and context.

In cases like *Goldman* such an endeavour is crucial for the peaceful coexistence of abstract regularity and uniformity to achieve presumably legitimate and constructive objectives on the one hand, and due acknowledgment of – and indeed deference to – individual self-rule, on the other. Rehnquist J argued that the standard of strict scrutiny normally applied to determine the constitutionality of measures invading religious freedom, did not apply to military regulations: the Court had to defer to the judgment of military authorities about what to do in military interest and especially what measures to design to ensure military discipline – even if those

42 Lourens du Plessis *Re-Interpretation of Statutes* (2001) 28.

43 Namely Michelman (note 6 above) and Michelman (note 29 above) 1493-1537.

44 106 S Ct 1310 (1986).

45 Michelman (note 6 above) 16.

measures encroached on freedom of individual expression.⁴⁶ Rehnquist J either overlooked or simply denied that in a case such as that there was tension between general, rule-like demands and the particular exigencies of self-rule.

Stephens J thought that wearing a yarmulke with his uniform was, given Goldman's status and duties, such a modest departure from uniform regulations that it hardly compromised the military mission of the US Air Force. Goldman thus presented an appealing case for an exception to the dress rules, *but neutrality and the rule of law (regrettably) preclude such an exception*.⁴⁷ Goldman's yarmulke did not present 'so extreme, so unusual or so faddish an image that public confidence in his ability to perform his duties will be destroyed', but the same would probably not hold for a uniformed Sikh wearing a turban or his Rastafarian colleague wearing dreadlocks.⁴⁸ Regrettably the court therefore had to deny Goldman the benefit of an exception that could not also be made for a Sikh or a Rastafarian.

It appears from the judgment of Stevens J that, in instances where constitutional recognition for unusual or eccentric particularities is sought, the polarity of universe and context is likely to manifest as a tension between sameness and difference or 'selfness' and 'otherness'. Such a tension most often results from the stereotypic overtones of (value) judgments of 'difference' or 'otherness' from the perspective of a dominant 'sameness' or 'selfness'. It is precisely such stereotyping that Brennan J confronted head-on, claiming that uniformity under the Air Force dress code is illusory since the code's prescriptions are premised on what is acceptable to mainstream Christians as members of *the* majority religion. The military authorities should be required to come up with specific, functional justification for each dress rule, for '[t]he military, with its strong ethic of conformity and unquestioning obedience, may be particularly impervious to minority needs and values'.⁴⁹ Blackmun J, however, was quick to point out that there are minorities *and* *minorities*: some minority religions (and in particular Orthodox Jewry as a more established, mainstream religion) could be favoured over against others because the religious practices of the former might be seen to be less obtrusive than those of the latter – and therefore also easier to accommodate.⁵⁰ The ad hoc, flexible test suggested by Brennan J can thus result in disfavouring some minority religions by comparison with others.⁵¹

O'Connor J crafts an articulate, two-pronged test or standard whereby to assess the constitutionality of the dress regulations. First, the government must show that its (dress) measures overriding freedom of religion as an interest specifically protected in the Bill of Rights, asserts an interest of 'especial importance'.

Second, since the Bill of Rights is expressly designed to protect the individual against the aggregated and sometimes intolerant powers of the state, the government must show that the interest asserted will in fact be substantially harmed by granting the type of exemption requested by the individual.⁵²

She maintains that there is no reason to accept, from the outset, that military regulations and action have to be treated differently from any other government regulations or action, but on

46 *Goldman v Weinberger* (note 44 above) 1312–1313.

47 *Ibid* 1314–1315.

48 *Ibid* 1316.

49 *Ibid* 1323.

50 *Ibid* 1320–1322.

51 Michelman (note 6 above) 11.

52 *Goldman v Weinberger* (note 44 above) 1325.

balance the need for military discipline and an esprit de corps is an interest of 'especial importance' that passes the first part of the test. However, in the case before the Court the government failed to show that any interest it asserted, had substantially been harmed by Goldman wearing a yarmulke with his uniform. There was, as a matter of fact, no evidence suggesting that Goldman's conduct had ever caused discontent or a breach of discipline. The government thus failed to comply with the second requirement.⁵³

When dealing with questions 'of generality and particularity, sameness and difference, rules and reasons'⁵⁴ from a civic republican perspective it is, according to Michelman,⁵⁵ important to stress that the notion of an 'empire of laws and not men' precludes

the foisting of responsibility for the immediate decision of a public controversy upon any nonpresent, unexaminable, impersonal, or abstract authority – the sovereign, the law, the rule, the precedent, the Air Force. It demands, instead, acceptance of unmediated responsibility by those present and acting at the moment of decision.

This assertion may seem pretty 'disruptive' given the seemingly instinctive inclination of judges resolving 'public controversies' to justify their preference for a particular outcome in abstract, rule-like terms. In *Goldman* even O'Connor J, the Supreme Court judge arguably most alert to ad hoc, 'contextual' considerations,⁵⁶ for instance, found it necessary to formulate an abstract, two-pronged standard to justify her context-sensitive conclusion. Michelman⁵⁷ concedes that his powerful assertion of the *personal* responsibility of judges for their decision of public controversies may be mistaken as a preference for the empire of men rather than that of law. However, the kind of reasoning discussed in section II(b) above is meant to counter precisely this inference.

(ii) *Bowers v Hardwick*⁵⁸

The crisp question before the US Supreme Court in this case was one that has been before the South African Constitutional Court too:⁵⁹ is the criminalisation of consensual, homosexual sex between two (male) adults (or 'sodomy' as it is commonly known) constitutional? In casu one Hardwick was arrested for (but eventually not charged with) the contravention of a law of the state of Georgia criminalising sodomy. He proceeded nonetheless to challenge the constitutionality of the law in question. A district court judge dismissed Hardwick's claim, but a divided panel of the Eleventh Circuit found in his favour. The case eventually went to the US Supreme Court.

Here the majority, per White J, concluded that the impugned Georgian law was constitutional, since it did not violate any constitutional right of the applicant: the US Constitution makes no provision for a right to consensual, homosexual sex between adults. A trite reminder that the law 'is constantly based on notions of morality' in concert with a certain

⁵³ Ibid 1326.

⁵⁴ Michelman (note 6 above) 12.

⁵⁵ Ibid 17.

⁵⁶ Michelman (note 6 above) 14 also seems to suggest this much.

⁵⁷ Ibid 17.

⁵⁸ 478 US 186 (1986).

⁵⁹ The South African case being *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 1998 (12) BCLR 1517 (CC); see II(d)(ii) below.

perception of ‘majority sentiments about ... morality’,⁶⁰ prompted the conclusion of the majority of the Court that, in the view of the ‘people’, sodomy (albeit between consenting adults) is an immoral, social ill-deserving of or, at least, not immune to criminalisation. A court recognising a fundamental right to engage in sodomy, White and the majority of the Court thought, would impose its members’ ‘own choice of values’ on the people whose moral beliefs in this regard are manifested in the legislated will of the Georgia majority.⁶¹ On the unstated assumption that a court is a servant and not a (co-)author of the constitutional (or any other prescriptive) text,⁶² White J and the majority held that a court declaring the existence of a constitutional right without cognisable roots in the language and/or design of the Constitution, was overstepping the bounds of its authority and assumed the power ‘to govern the country without express constitutional authority’.⁶³ White J disagreed with the minority view of Blackmun J that Hardwick’s claim is sustainable ‘in the light of the values that underlie the constitutional right of privacy’ because this view ‘cannot be credibly traced to any historical occasion of popular higher law-making’.⁶⁴ It would, according to White J, be facetious to assume that constitutional indications of a popular sentiment in favour of insulating family privacy from uncalled-for invasions by the government – ruling in the name and on behalf of the people – were meant to licence homosexual sodomy.⁶⁵

Michelman, from a civic republican perspective, voices several misgivings about the attitude of the majority in *Bowers* towards constitutionalism and constitutional adjudication in particular. He detects in this attitude a striking resistance to obvious claims of political freedom and stresses that ‘constitutional analysis ought to be receptive to such claims’. He also points out that constitutional analysis is rooted in underlying ‘sensibilities and understandings regarding the larger aims and methods of constitutionalism’.⁶⁶ Michelman is critical of the majority’s affection for a moral majoritarianism – which, in the very words of White J, ‘is firmly rooted in Judaeo-Christian moral and ethical standards’⁶⁷ – but what he finds even more alarming is the judges’ ‘excessively detached and passive judicial stance towards constitutional law’⁶⁸ which they justify by claiming that it is a court’s province to engage in constitutional adjudication as ‘an organ of law, and therefore not of politics’.⁶⁹ This ‘judicial posture’ gives rise to a backward-looking and indeed *authoritarian* jurisprudence that regards

adjudicative actions as legitimate only insofar as dictated by the prior normative utterance, express or implied, of extra-judicial authority.⁷⁰

Such an evasion of judicial discourse engaging with issues political – and vital to a litigant’s constitutional claim(s) – precludes consideration of strategies to build the litigant’s capacity for self-rule commensurate with (if not identical to) the exigencies of law-rule. And this brings us

60 *Bowers v Hardwick* (note 58 above) 196.

61 *Ibid* 192-194.

62 Michelman (note 29 above) 1497.

63 *Bowers v Hardwick* (note 58 above) 194-195.

64 As Michelman (note 29 above) 1497 explains.

65 *Bowers v Hardwick* (note 58 above) 194.

66 Michelman (note 29 above) 1494.

67 *Bowers v Hardwick* (note 58 above) 196.

68 Michelman (note 29 above) 1496.

69 *Ibid* 1497.

70 *Ibid* 1496.

back to one of the key assertions in Michelman's CALS address, namely that analytical jurisprudence should be kept from colonising political argument.⁷¹

(d) Test-driving Civic Republican Ideas on (Constitutional) Roads in South Africa

(i) The Prince Saga: Our own Coverian Parable

Michelman,⁷² with reference to insights of Robert Cover,⁷³ describes *Goldman v Weinberger*⁷⁴ as a 'Coverian parable'. Goldman belonged to a community described by Cover as a 'paideic community':

Such a community is formed by strong interpersonal bonding through shared commitment to a specific moral tradition and its contemporary elucidation. The work of elucidation is the community's *paideia*, through which the members find personal integrity and personal freedom.⁷⁵

Gareth Prince, a consumer of *Cannabis sativa* (or dagga) for spiritual, medicinal, culinary and ceremonial purposes as an integral part of practising his religion as a Rastafarian, is a South African member of a community as paideic as can be, seeking to create, with 'paideic integrity', an own 'nomos' or 'normative universe' over and against 'imperial proscription'.⁷⁶ The Prince saga unfolded in four judgments handed down by three South African courts.⁷⁷

Prince successfully completed his legal studies to a point where, qualification-wise, he became eligible to be registered as a candidate attorney doing community service. He had twice been convicted of the statutory offence of possessing dagga, however, and this raised doubts as to whether he was a fit and proper person to be registered as a candidate attorney, especially in the light of his declared intention to continue using dagga. The Law Society of the Cape of Good Hope refused him registration whereupon he challenged the society's decision in the Cape High Court.⁷⁸ The Court held that the statutory prohibition on the use of dagga was meant to protect public safety, order, health and morals and that these considerations outweighed (and thus limited) the right of Rastafarians to practice their religion through the use of dagga. The court thus refused to overturn the law society's decision.

Prince appealed to the Supreme Court of Appeal.⁷⁹ This Court adopted more or less the same line of reasoning as the court a quo, emphasising the limitability of Prince's right to religious freedom over against the public good that the statutory prohibition on the possession and use of dagga seeks to promote.⁸⁰

⁷¹ See 2.1 above.

⁷² Michelman (note 6 above) 13.

⁷³ RM Cover 'The Supreme Court, 1982 Term – Foreword: Nomos and Narrative' (1983) 97 *Harvard LR* 4–59.

⁷⁴ 106 S Ct 1310 (1986).

⁷⁵ Michelman (note 6 above) 13 referring to Cover (note 73 above) 12–13.

⁷⁶ Michelman (note 6 above) 13; Cover (note 73 above) 12–13.

⁷⁷ *Prince v President of the Law Society, Cape of Good Hope* 1998 (8) BCLR 976 (C) (*Prince 1*); *Prince v President, Cape Law Society* 2000 (3) SA 845 (SCA) (*Prince 2*); *Prince v President, Cape Law Society* 2001 (2) BCLR 133 (CC) (*Prince 3*) and *Prince v President, Cape Law Society* 2002 (3) BCLR 231 (CC) (*Prince 4*).

⁷⁸ *Prince 1* (note 77 above).

⁷⁹ *Prince 2* (note 77 above).

⁸⁰ *Ibid* par [12].

The prevention of drug abuse is plainly a legitimate governmental aim and an effective prohibition thereof a pressing social purpose ...⁸¹ It is beyond doubt that the ban on the use and possession of cannabis in both Acts was imposed to protect society as a whole ...⁸² Lifting it partially to allow its uncontrolled use by one section of the community cannot leave society unaffected and adequately protected.

The Supreme Court of Appeal also thought that it would be quite impossible to police conduct authorised by limited exemptions (for, for instance, religious purposes) from the statutory prohibition in question.⁸³

The case then went to the Constitutional Court as final court of appeal in constitutional matters. A divided Court eventually dismissed the appeal with 5-4 majority,⁸⁴ but before doing so a unanimous Court handed down a significant interim judgment.⁸⁵ In this judgment the court intimated that neither the applicant nor the respondents had - in the course of the litigious process commencing in the Cape High Court - adduced sufficient evidence for any court finally to decide the crucial controversies involved in the case. From the applicant the Court needed more evidence as to precisely how and in which circumstances Rastafarians use dagga as part of their religious observances. From the respondents (which included the Minister of Justice and the Director of Public Prosecutions in the Western Cape) the Court needed evidential elucidation as to the practical difficulties that may be encountered should Rastafarians be allowed to acquire, possess and use dagga strictly for religious purposes. The case was postponed in order to give both sides the opportunity to adduce the required evidence. This is something quite extraordinary for a final court of appeal to do, since parties are normally required to adduce all the necessary evidence at the time when an action is brought in the court of first instance (in this case the Cape High Court). It is only in rare circumstances that litigants are allowed to adduce additional evidence on appeal. The Constitutional Court, however, thought that such circumstances existed in Prince's case and some of the arguments advanced to reach this conclusion, demonstrated both sensitivity to the applicant's dilemma and judicial responsiveness to the peculiar, 'cultural' needs of a minority religious community such as the Rastafarians. The court per Ngcobo J, for instance, made the following observations:

The constitutional right to practise one's religion ... is one of the hallmarks of a free society. ...⁸⁶

[T]he appellant belongs to a minority group. The constitutional right asserted by the appellant goes beyond his own interest – it affects the Rastafari community. The Rastafari community is not a powerful one. It is a vulnerable group. It deserves the protection of the law precisely because it is a vulnerable minority. The very fact that Rastafari use cannabis exposes them to social stigmatisation ... Our Constitution recognises that minority groups may hold their own religious views and enjoins us to tolerate and protect such views. However, the right to freedom of religion is not absolute. While members of a religious community may not determine for themselves which laws they will obey and which they will not, the state should,

81 The Court refers to *S v Bhulwana; S v Gwadiiso* 1996 (1) SA 388 (CC) 396B-C as authority.

82 Relying on *Administrator, Cape v Raats Röntgen and Vermeulen (Pty) Ltd* 1992 (1) SA 245 (A) 254B and *Mistry v Interim National Medical and Dental Council of South Africa* 1998 (7) BCLR 880 (CC) par [10] as authority.

83 *Prince 2* (note 77 above) par [13].

84 *Prince 4* (note 77 above).

85 *Prince 3* (note 77 above).

86 *Ibid* par [25].

where it is reasonably possible, seek to avoid putting the believers to a choice between their faith and respect for the law.⁸⁷

In the Constitutional Court's final judgment both the majority and the minority thought that it was of crucial significance to decide whether it would be possible for state agencies involved in enforcing the overall statutory prohibition on the use of dagga, to make any form of allowance for the use of small quantities of dagga for religious purposes without actually compromising the justifiable objectives of the overall prohibition. The majority thought that this would not be possible. The minority, on the other hand, while not disputing the legitimacy of criminalising the possession and use of dagga in general, argued that it was feasible for the state agencies involved to lay down and police conditions for Rastafarians' limited use of dagga for religious purposes. There are, however, subtle (and not so subtle) dissimilarities (other than a difference in outcome) in the reasoning of the majority and the minority of the Constitutional Court in this final *Prince* judgment to which attention will be drawn in due course.

There are judicial pronouncements in some of the judgments constituting the *Prince* saga that have much in common with pronouncements in *Goldman v Weinberger*⁸⁸ and *Bowers v Hardwick*⁸⁹ (especially pronouncements most vulnerable to critique inspired by civic republican notions). In *Prince* some such pronouncements are, however, countered with pronouncements that unmistakably breathe a civic republican spirit.

The judgments of the Cape High Court and the Supreme Court of Appeal clearly signal deference to prior normative utterances of an extrajudicial authority,⁹⁰ in casu the (pre-1994) national legislature. This shows in the judgment of the latter forum that limited Prince's right to religious freedom without making an effort to determine the scope and effect of this right. The Court, seemingly overawed by the prospect of admitting a dangerous dagga smoker to the distinguished ranks of the legal fraternity, paid little regard to what tangible implications the right to free exercise of religion by a Rastafarian or, for that matter any other religious adherent, *by definition* entails. This is a rights-unfriendly manner of dealing with a right as fundamental as the right to religious freedom. Prince was not an individual using dagga while on some religious frolic of his own, but a member of a denominational community sharing a particular belief on the use of dagga and conducting an observance that exposes its members, as a vulnerable, paideic minority, to both the manifest and hidden prejudices of a majority who condemns the use of dagga downright. The unanimous Constitutional Court in its interim judgment, on the other hand, did demonstrate alertness to the dilemmas associable with Rastafarians' minority position.

In the final judgment the minority of the Constitutional Court (per Ngcobo J) explicitly contended for a limitation strategy that – in contradistinction to the strategy of the Supreme Court of Appeal – would weigh the legitimate purpose that an impugned provision (allegedly) seeks to promote, against an aggrieved party's claim to assert a constitutionally entrenched, fundamental right:

87 Ibid par [26].

88 Note 44 above – see II(c)(i) above.

89 Note 58 above – see II(c)(ii) above.

90 See II(c)(ii) above.

Where ... the constitutional complaint is based on the failure of the statutory provisions to accommodate the religious use of cannabis by the Rastafari, the weighing-up and evaluation process must measure the three elements of the government interest, namely, the importance of the limitation; the relationship between the limitation and the underlying purpose of the limitation; and the impact that an exemption for religious reasons would have on the overall purpose of the limitation. The government interest must be balanced against the appellant's claim to the right to freedom of religion which also encompasses three elements: the nature and importance of that right in an open and democratic society based on human dignity, equality and freedom; the importance of the use of cannabis in the Rastafari religion; and the impact of the limitation on the right to practice the religion.⁹¹

This line of argumentation is sensitive to the dynamics (and intricacies) of 'rule by external authority' (conceivably also law-rule) and self-rule *in interaction with each other*.⁹² Sachs J concurred in the minority judgment handed down by Ngcobo J, but elaborated on his reasons for doing so in an additional (minority) judgment. He explained, in a more philosophical vein, why the limitation of (religious) rights calls for reciprocity:

[A]lthough notional and conceptual in character, the weighing of the respective interests at stake does not take place on weightless scales of pure logic pivoted on a friction-free fulcrum of abstract rationality. The balancing has always to be done in the context of a lived and experienced historical, sociological and imaginative reality. Even if for purposes of making its judgment the Court is obliged to classify issues in conceptual terms and abstract itself from such reality, it functions with materials drawn from that reality and has to take account of the impact of its judgments on persons living within that reality. Moreover, the Court itself is part of that reality and must engage in a complex process of simultaneously detaching itself from and engaging with it.⁹³

Towards the end of his judgment Sachs J suggested that reciprocity may also serve the purpose of quelling antagonisms – between the aspirations of a dissident, self-ruling individual and the (law-)rule of a purportedly crooked state:

[A]s has historically been the case with many non-conformist or dissident religions, Rastafari identify themselves by their withdrawal from and opposition to what they regard as the corrupt temporal and spiritual power of Babylon. If pressed to an extreme, no accommodation between the 'allegedly corrupt' state and the 'manifestly defiant' religious dissident would be possible. The balancing which our Constitution requires, however, avoids polarised positions and calls for a reasonable measure of give-and-take from all sides.⁹⁴

The majority of the Constitutional Court, handing down the (effective) final judgment in *Prince*, painstakingly pointed out that in their judgment they would be talking 'law' and not 'politics'.⁹⁵

91 *Prince* 4 (note 77 above) par [46].

92 See also II(b) above.

93 *Prince* 4 (note 77 above) par [151].

94 *Ibid* par [161].

95 See also II(c)(ii) above.

The question before us ... is not whether we agree with the law prohibiting the possession and use of cannabis. Our views in that regard are irrelevant. The only question is whether the law is inconsistent with the Constitution. The appellant contends that it is because it interferes with his right to freedom of religion and his right to practise his religion. It is to that question that we now turn.⁹⁶

In the majority's view the legislature (and not any branch of the judiciary) is the appropriate authority to decide whether the possession and use of dagga should be criminalised:

In a democratic society the legislature has the power and, where appropriate, the duty to enact legislation prohibiting conduct considered by it to be anti-social and, where necessary, to enforce that prohibition by criminal sanctions. In doing so it must act consistently with the Constitution, but if it does that, courts must enforce the laws whether they agree with them or not.⁹⁷

The most astonishing feature of the majority judgment is that, after initial assertions of judicial neutrality in matters political, it turns into a slanted political (and, in particular, *policy*) discourse in justification of a blanket ban on the use of dagga and a refusal of exceptions – also for religious purposes. Policy-style reasoning is invoked to point out why it would practically be well-nigh impossible to police Rastafaris' abidance by conditions to which exemptions from the ban on cannabis – for religious purposes – will have to be subject. It is almost as if (to use Michelman's terminology) political argument is colonising analytical jurisprudence.⁹⁸ In actual fact, however, the exact opposite (against which Michelman cautioned in his CALS address) is the case. The majority conceive of the laws that they profess to 'enforce ... whether they agree with them or not' in analytical terms as prior normative utterances of an extra-judicial authority worthy of judicial deference – irrespective of their political (or policy) merits and demerits. This figment of a highly abstract, analytical jurisprudence colonises (pre-emptively, as it were) any possible political utterance coming from the Court, in an effort to sustain the illusion that the Court's utterances will be politically neutral. In this manner 'purely legal' utterances rubberstamp the enacted political (or policy) decisions of extrajudicial authorities – and make them 'legal' – while the Court shrugs off its responsibility to engage in a political discourse of its own.

Sachs J emphasised, towards the end of his judgment, that

faith and public interest overlap and intertwine in the need to protect tolerance as a constitutional virtue and respect for diversity and openness as a constitutional principle. Religious tolerance is accordingly not only important to those individuals who are saved from having to make excruciating choices between their beliefs and the law. It is deeply meaningful to all of us because religion and belief matter, and because living in an open society matters.⁹⁹

This is a civic republican move, acknowledging that self-rule is as much a matter of public interest as is law-rule. The professional future of Gareth Prince and others like him is thus also a matter of *public* concern that, in the course of the whole saga, did not receive the attention it deserved. In 1954 a South African court said the following in the course of considering whether a very well-known South African, who had been sentenced to life-imprisonment for

⁹⁶ *Prince 4* (note 77 above) par [109].

⁹⁷ *Ibid* par [108].

⁹⁸ See II(a) above.

⁹⁹ *Prince 4* (note 77 above) par [170].

what (by the official standards of the time) were very serious offences, had remained a fit and proper person to be an attorney:

The sole question that the Court has to decide is whether the facts which have been put before us and on which the respondent was convicted show him to be of such character that he is not worthy to remain in the ranks of an honourable profession. To that question there can, in my opinion, be only one answer. Nothing has been put before us which suggests in the slightest degree that the respondent has been guilty of conduct of a dishonest, disgraceful, or dishonourable kind; nothing that he has done reflects upon his character or shows him to be unworthy to remain in the ranks of an honourable profession. In advocating the plan of action, the respondent was obviously motivated by a desire to serve his fellow non-Europeans. The intention was to bring about the repeal of certain laws which the respondent regarded as unjust. The method of producing that result which the respondent advocated is an unlawful one, and by advocating that method the respondent contravened the statute; for that offence he has been punished. But this offence was not of a 'personally disgraceful character', and there is nothing in his conduct which, in my judgement, renders him unfit to be an attorney.

Mr *O'Hagan* contended that the test of whether the Court should take disciplinary action against the respondent is whether the conduct is 'a matter of indifference to the Court'. As the authorities I have quoted show, that is not the test. The respondent's conduct is not a matter of indifference to the Court; he has been tried, convicted and punished. He must not be punished again by being struck off the roll or suspended. That action will only be taken if what he had done shows that he is unworthy to remain in the ranks of an honourable profession.¹⁰⁰

The person's professional future thus considered was of course the now iconic Nelson Mandela who, after 27 years in prison, became South Africa's first democratically elected president in 1994. In Prince's case the Supreme Court of Appeal refused to give Prince the benefit of the guidelines laid down in the *Mandela* case¹⁰¹ mainly because Prince declared his intention to continue using dagga and thus breaking the law. Mthiyane AJA pointed out that the appellant, should he be admitted as an attorney, would have to take an oath that he would (among other things) 'be faithful to the Republic of South Africa'.¹⁰² The Court concluded:

[A]ny person who wishes to be a member of the attorneys' profession and takes the oath ... also swears or affirms loyalty to the laws of the Republic of which the Drugs Act and the Medicines Act are a part. If the appellant declares that he will defy any of the laws of the Republic, it is difficult to see how he can be considered to be a fit and proper person as is envisaged in the Attorneys Act. His conduct seems to me to amount to a repudiation of the oath or affirmation of allegiance even before he takes it.¹⁰³

The Court seems to be rather indifferent to the appellant's allegiance to his religion. The civic republican notion of self-rule certainly prompts due cognisance of Prince's personal dilemma in realising his 'being what he is' – and it does so in the *public interest*. In none of the four judgments in the *Prince* saga serious attention was devoted to the possible harm that Prince's registration as a candidate attorney doing community service could actually cause. The

100 *Incorporated Law Society, Transvaal v Mandela* 1954 (3) SA 102 (T) 108C–H.

101 *Prince 2* (note 77 above) par [17] and especially the contentions of Mthiyane AJA in a separate judgment.

102 *Prince 2* (note 77 above) pars [3]–[4] of Mthiyane AJA's judgment.

103 *Prince 2* (note 77 above) par [6] of Mthiyane AJA's judgment.

majority of the Constitutional Court in the final judgment simply accepted that the correctness of the decision not to register Prince was no longer in dispute,¹⁰⁴ but certain remarks of Ngcobo J speaking for the minority create the impression that this was not really the case.¹⁰⁵ Be it as it may, a consciousness of, for instance, Michelman's three stipulations as conditions on which self-rule and law-rule can be perceived as amounting to the same thing,¹⁰⁶ leads one to realise that, in the circumstances of Prince's case, the existential question whether he is a fit and proper person to be an attorney, is an issue as constitutional as can be, and it should have been taken much more seriously by South Africa's highest court in constitutional matters. Instead it devoted almost its entire energy to more abstract questions concerning the desirability of the ban on dagga and the feasibility of exemptions for religious purposes.

(ii) Self-rule – behind Closed Doors?

Issue-wise *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*¹⁰⁷ (hereinafter 'the sodomy case') is the South African counterpart of *Bowers v Hardwick*¹⁰⁸ dealing with the question whether the criminalisation of consensual sex between adult men is constitutional. There are, however, also significant differences between the two cases. First, in the South African context, the pivotal question had to be answered with reference to a constitutional text that explicitly proscribes discrimination on the ground of sexual orientation.¹⁰⁹ This contemporary text that relates issues of (unfair) discrimination systematically to other key values that it also enshrines, begat a more coherent answer to the pivotal question from the South African Constitutional Court than did the much older US Bill of Rights from the US Supreme Court. Second, the South African case was brought by organs of civil society as part of a premeditated, purposeful campaign to promote gay rights (and this included endeavours to decriminalise same-sex sexual conduct between men) whereas the US case, in more of an ad hoc manner, emanated from serving an arrest warrant on Hardwick on a charge of failing to appear in court for drinking in public.

In the South African case the unanimous Constitutional Court (with Ackermann and Sachs JJ writing the judgments) held that impugned common-law and statutory measures criminalising sodomy infringed the constitutionally entrenched rights to equality, human dignity and privacy to such an extent and in such a manner that the said measures could not pass muster as constitutionally acceptable limitations to the rights in question. From a civic republican perspective the Court's attitude towards intrusions into the rights to human dignity and privacy respectively are most instructive and will briefly be considered seriatim.

Section 10 of the South African Constitution states that '[e]veryone has inherent dignity and the right to have their dignity respected and protected'. However, the Constitution also affords human dignity operational efficacy as a central (and pivotal) value:

104 *Prince* 4 (note 77 above) par [170].

105 *Ibid* par [170].

106 Michelman (note 29 above) 1501; see II(b) above.

107 Note 59 above.

108 Note 58 above; see also 2.3.2 above.

109 Constitution of the Republic of South Africa, Act 108 of 1996 section 9(3).

- South Africa is, for instance, said to be a democratic state founded on the values of, among others, *human dignity*, the achievement of equality and the advancement of human rights and freedoms.¹¹⁰
- The Bill of Rights, it is said, ‘affirms the democratic values of a free open and democratic society based on *human dignity*, equality and freedom’ (my italics).¹¹¹
- That which is justifiable in an open and democratic society based on human *dignity*, equality and freedom is required to steer both the interpretation of¹¹² and adjudication of limitations to¹¹³ rights entrenched in the Bill of Rights.

‘Human dignity’ as a constitutional value is invariably mentioned in conjunction with ‘equality’ and ‘freedom’ which makes it a key force in negotiating the perennial tension between freedom and equality so typical of human rights discourse. A constitutional value of such pivotal significance can easily be overused as a ‘covering value’ to justify all sorts of outcome in human rights argumentation when arguments drawing on other values seem to ‘have run out’. According to some the Constitutional Court has indeed been guilty of such overuse, but whether this is actually the case is a matter of contention about which there are conflicting opinions.¹¹⁴ What the controversy clearly emphasises is that it is important, first, to distinguish between dignity as a constitutional value and the fundamental right, in section 10 of the Constitution, to have one’s dignity respected and protected and, second, to assign meanings to the concept of dignity in a rigorous and thoughtful manner. The sodomy case is helpful in both respects.¹¹⁵ From a civic republican perspective it is particularly noteworthy that Ackermann J links dignity with subjects’ (in casu gay men’s) ‘experience of being human’¹¹⁶ and their ‘ability to achieve self-identification and self-fulfilment’.¹¹⁷ In an extrajudicial statement¹¹⁸ Ackermann J described ‘the ability to understand or at least define oneself through one’s own powers and to act freely as a moral agent pursuant to such understanding of self-definition’ as ‘definitional to being human’. These statements all suggest that ‘human dignity’ can denote a citizen’s optimal hold over conditions that in actual fact or potentially determine her or his destiny – in day-to-day life, but also in crucial matters going beyond that. This, of course, is civic republican language. The civic republican notion of self-rule as law-rule (and vice versa) can help infuse the dignity discourse in South African jurisprudence not only with greater conceptual clarity, but also with public spiritedness – which will both be developments in a positive direction.

The sodomy case furthermore illustrates that (and why) in South Africa consideration of the nature, scope and usefulness of the constitutionally entrenched right to privacy often stirs

110 Constitution of the Republic of South Africa, Act 108 of 1996 section 1 – and section 1(a) in particular – my italics.

111 In section 7(1) of the Constitution – my italics.

112 Section 39(1)(a) of the Constitution.

113 Section 36(1) of the Constitution.

114 For a very helpful and insightful discussion of this debate, see S Cowen ‘Can “Dignity” guide South Africa’s Equality Jurisprudence?’ (2001) 17 *SAJHR* 34–58.

115 Cf e.g. *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (note 59 above) pars [28]–[32].

116 Ibid par [28].

117 Ibid par [36].

118 In a Bram Fischer Lecture delivered at Rhodes House, Oxford on 26 May 2000 – see Cowen (note 114 above) 35 footnote 2 and 43.

controversy. Some of the applicants in the sodomy case were (to say the least) sceptical about reliance on this right to challenge the constitutionality of the criminalisation of sodomy. Sachs J explains their misgivings as follows:

[P]rivacy analysis is inadequate because it suggests that homosexuality is shameful and therefore should only be protected if it is limited to the private bedroom; it tends to limit the promotion of gay rights to the decriminalisation of consensual adult sex, instead of contemplating a more comprehensive normative framework that addresses discrimination generally against gays; and it assumes a dual structure – public and private – that does not capture the complexity of lived life, in which public and private lives determine each other, with the mobile lines between them being constantly amenable to repressive definition.¹¹⁹

Ackermann¹²⁰ and Sachs¹²¹ JJ both recognised the validity of these concerns, but argued that this does not preclude reliance on the right to privacy – in addition to reliance on other constitutionally entrenched rights such as those to equality and dignity – to challenge the constitutionality of the provisions in question. Sachs J, for instance, explained how the violation of one specific right could be exacerbated because an interest entailed in that right converges with an interest entailed in another right:

Thus, the violation of equality by the anti-sodomy laws is all the more egregious because it touches the deep, invisible and intimate side of people's lives. The Bill of Rights tells us how we should analyse this interaction: in technical terms, the gross interference with privacy will bear strongly on the unfairness of the discrimination, while the discriminatory manner in which groups are targeted for invasions of privacy will destroy any possibility of justification for such invasions.¹²²

I agree with the outcome of these arguments. However, reliance on a more pronounced, public-spirited conception of privacy – with which at least Sachs J would probably have been comfortable¹²³ – prompts the same conclusion. Frank Michelman makes this argument and thereby divulges a most eye-opening and incisive insight, namely that *for the zoön politikon* *privacy and its constitutional protection are not private, but public matters*.¹²⁴

By contrast to [the] oft-used strategy of carving a private space to defend against the public, a republican slant on the same issues produces a reoriented understanding: not only an appreciation of the active state's potential as an affirmative friend to effective liberty, as political freedom, but an appreciation of privacy as a political right.

Just as property rights – rights of having and holding material resources – become, in a republican perspective, a matter of constitutive political concern as underpinning the

119 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (note 59 above) par [110]. See also Edwin Cameron 'Sexual Orientation and the Constitution: A Test Case for Human Rights' (1993) 110 *SALJ* 450–472.

120 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (note 59 above) pars [29]–[32].

121 *Ibid* par [111].

122 *Ibid* par [114].

123 *Ibid* par [119].

124 Michelman (note 29 above) 1532–1537.

independence and authenticity of the citizen's contribution to the collective determinations of public life, so is it with the privacies of personal refuge and intimacy.¹²⁵

An argument along these lines aptly illustrates what Michelman calls 'the re-collective aspect of constitutional-legal interpretation' by realigning 'our accustomed sense of the relation between privacy and political freedom ... regarding privacy not only as an end (however controversial) of liberation by law *but also as such liberation's constant and regenerative – jurisgenerative – beginning*' (emphasis added).¹²⁶ From this perspective the South African Constitutional Court's template dictum – in *Bernstein v Bester*¹²⁷ (per Ackermann J) – on the nature of the constitutionally entrenched right to privacy may seem to lack public spiritedness and 'overprivatise' privacy:

The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.

To determine the effect of the right to privacy in a specific instance with reference to 'a continuum of privacy rights which may be regarded as starting with a wholly inviolable inner self, moving to a relatively impervious sanctum of the home and personal life, and ending in a public realm where privacy would only remotely be implicated, if at all'¹²⁸ could mean that, depending on exactly where along the continuum one finds oneself, it is possible to completely privatise privacy as a constitutional issue. However, Ackermann J also seems to have endorsed the view that the right to privacy is 'not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's autonomous identity'.¹²⁹ The right to privacy is, in other words, not simply a right to be left alone and Ackermann J seems to have been alert to communitarian criticism of such an individualistic and libertarian conception of the said right.¹³⁰ He, for instance, pointed out that the concept of 'privacy' does not have only one but at least three cores. The first denotes private living space, the second inheres in the person, and the third relates to the protection of certain intimate relationships.¹³¹ I therefore agree with Henk Botha¹³² that, on closer examination, Ackermann J's view of the right to privacy is premised on the notion of a socially constituted individual 'enmeshed in various relations, cultures, communities and thoughtways, to develop and express her own

125 Ibid 1534–1535.

126 Ibid 1535.

127 1996 (2) SA 751(CC) par [67].

128 To quote the words of O'Regan and Sachs JJ from *Jordan v S* 2002 (11) BCLR 1117 (CC) par [76].

129 *Bernstein v Bester* (note 127 above) par [65].

130 Ibid par [65] footnote 90.

131 Ibid par [65] footnote 89 and par [80].

132 'Metaphoric Reasoning and Transformative Constitutionalism' 2002 *TSAR* 612; 2003 *TSAR* 20.

identity'.¹³³ However, his previously quoted, template dictum on the right to privacy, taken in isolation, could entice less than vigilant judicial successors to an individualistic and libertarian conception of the right to privacy uninspired by public spiritedness. Take, for example, the following dictum from *Jordan v S*.¹³⁴

By making her sexual services available for hire to strangers in the marketplace, the sex worker empties the sex act of much of its private and intimate character. She is not nurturing relationships or taking life-affirming decisions about birth, marriage or family; she is making money. Although counsel for the appellants was undoubtedly correct in pointing out that this does not strip her of her right to be treated with dignity as a human being and to have respect shown to her as a person, it does place her far away from the inner sanctum of protected privacy rights. We accordingly conclude that her expectations of privacy are relatively attenuated. Although the commercial value of her trade does not eliminate her claims to privacy, it does reduce them in great degree.

This dictum – coming from O'Regan and Sachs JJ's 'friendlier' minority judgment as it were – formed the basis for the minority's conclusion that the criminalisation of sex-work is a constitutionally passable limitation¹³⁵ of an already 'relatively attenuated' right to privacy.¹³⁶ The flaw in this dictum is the assumption that if a woman 'goes public' with sex, offering it for money on the streets, such sex is per se (relatively) deprived of its distinctive intimacy and privacy. The public dimension of constitutionally protected privacy – also insofar as it is associated with sexual intimacy – is ubiquitous. This means that, *for constitutional purposes*, sex sold for money is not per se 'less private' than any other form of sex. It is possible to sell a form of intimacy (still) worthy of constitutional protection. To come to this conclusion, one's personal, moral judgment should not be allowed to colonise one's civic, political judgment. The latter judgment allows for (and indeed requires) even-handed protection of the privacy of each and every socially constituted citizen – even a citizen who publicly 'advertises' that a 'commodity' closely associated with her or his privacy is 'for sale'. It is true that the minority in *Jordan* did not *deny* sex-workers' right to privacy altogether, but it is unclear to what extent their conclusion that sex-workers' 'expectations of privacy are relatively attenuated' facilitated the conclusion that the criminalisation of sex-work is a constitutionally passable limitation of sex-workers' right to privacy.

III 'APPROACHES' TO AND/OR METHODS OF (CONSTITUTIONAL) INTERPRETATION

In the last part of his CALS address Michelman pays attention to 'a kind of standard list of interpretative approaches or methods available to constitution adjudicators – from which, it is sometimes imagined, a judge chooses one (or perhaps just falls into one)'.¹³⁷ First on the list is *literalism* that applies 'the text to the case according to the ordinary meaning of the words, as

133 Ibid 2003 *TSAR* 33.

134 Note 128 above par [83].

135 In terms of section 33(1) of the transitional Constitution. In pars [2]–[4] of the majority judgment Ngcobo J explains why the transitional Constitution applied.

136 *Jordan v S* (note 128 above) pars [86]–[94].

137 Michelman (note 1 above) 482.

... a Martian who was fluent in the country's standard language usages [would construe them]'.¹³⁸ Second on Michelman's list is intentionalism 'applying the clause as one judges the writer of it would have done', and third is purposivism 'applying the clause in the way that one judges will best accomplish the lawmaker's primary or higher or transcendent purpose, even if the concrete results would somewhat surprise the lawmaker'.¹³⁹ Fourth, '[i]nstrumentalism is determining the sense of a legal text's or doctrine's application to a particular case by first comparing the predicted social consequences of applying it in one or the other sense, and then preferring the sense that has the preferred consequences, as measured by a kind of ad hoc or pragmatic common sense'.¹⁴⁰ Finally, '[m]oralism is determining concrete applications by reference to a high-level, substantive moral theory supposed to be instantiated by the Constitution as a whole'.¹⁴¹

These approaches, Michelman claims,

cannot be alternatives, among which a judge chooses: they are multiple poles in a complex field of forces, among which judges navigate and negotiate.¹⁴²

For argument's sake Michelman assumes that the five '-isms' above can broadly be classified into two groups that 'may seem to stand on opposite sides of an important divide', namely *objectivist* approaches (literalism, intentionalism and purposivism) and *non-objectivist* (instrumentalist and moralist) approaches.¹⁴³ This distinction reflects a popular view which Michelman then continues to 'deconstruct' (as it were) by pointing out that objectivism is by no means a reliable point of reference to distinguish between interpretive approaches: objectivism more often than not draws on profoundly subjective preferences of the interpreter while the non-objectivist approaches can quite comfortably be dressed up in the objectivist uniforms of 'external authority'. This leads Michelman to the following conclusion:¹⁴⁴

On the constitutional level, legal interpretation succeeds by construing legal words, intentions and purposes, yes, but by construing them decidedly in the light of consequences, and by appraising consequences decidedly in the light of an emergent national sense of justice to which the interpretations are themselves, recursively, contributing.

Michelman's observations on how approaches to constitutional interpretation 'work' in practice, has been borne out by our experience in South Africa so far and moreover gives pause for the reconsideration of the role – in constitutional interpretation – of what we in this country have conventionally conceived of as 'theories of (statutory) interpretation'. At least Michelman's three objectivist approaches to constitutional interpretation are to be found among conventional common-law theories of interpretation in South Africa with perhaps contextualism – that is determination of meaning by reading words or language or a provision as a whole *in context*¹⁴⁵ – as a local contender to be added to the list. Judicial flirtation with decidedly non-objectivist approaches to statutory interpretation (such as instrumentalism and moralism) is

¹³⁸ Ibid 482.

¹³⁹ Ibid 482.

¹⁴⁰ Ibid 482.

¹⁴¹ Ibid 482.

¹⁴² Ibid 483.

¹⁴³ Ibid 483.

¹⁴⁴ Ibid 485.

¹⁴⁵ Du Plessis (note 42 above) 111–112.

extremely rare (if at all existent!) since in South Africa the interpretation of enacted law has traditionally been thought of as an apolitical and morally neutral procedure. Some academics writing in the context of common-law interpretation of statutes have advocated some seemingly less objectivist approaches to statutory interpretation, notably the *delegation theory* and other *judicial or free theories* of interpretation.¹⁴⁶ The *delegation theory* is meant as an antidote to the subjectivism of intentionalism, contending that once a law has been enacted the legislature has had its say and the text assumes an existence of its own. Also known as 'objectivism'¹⁴⁷ the delegation theory entrusts the function of concretising statutes, that is, bringing them to completion in life's concrete situations, to the courts that are said to be acting as the legislature's delegates. *Judicial or free theories* of statutory interpretation recognise and justify *judicial activism*, premised on the belief that judges have a creative role to play in the interpretation and application of enacted law. Constitutionalism and constitutional interpretation, associated with increased and increasing demands on the judiciary to make and to help assure the implementation of policy-like decisions, have enhanced conditions conducive to the onset and growth of the delegation theory and other free theories of interpretation.

In legal parlance (especially in South Africa) the word 'theory' is often used rather loosely. Sometimes it is used as a synonym for 'rule' or 'precept'. The 'expedition theory' in the law of contract is, for instance, in essence a rule prescribing that a contract concluded by mail comes into existence the moment that the written acceptance of an offer is posted.¹⁴⁸ This 'theory' is preferred to the 'information theory' according to which such a contract will enter into force the moment the offeree's acceptance comes to the attention of the offeror, that is, when the latter receives and reads the letter of acceptance. In the context of statutory interpretation 'theory' seldom if ever has the connotation of 'rule' or 'precept'.

In a more conventional sense a 'theory' is, on the one hand, an 'explanation' or 'explication'.¹⁴⁹ Scholarly or scientific theories are examples of such explanatory models. On the other hand, a theory can also be an idea accounting for a situation or, especially in law, justifying a certain course of action. The theory then advances the principles on which the practice of an activity is based.¹⁵⁰ Theories of statutory interpretation are explanatory and justificatory at the same time and are therefore associable with what Michelman quite appropriately calls 'interpretative approaches'.

Any legal interpreter's theory of interpretation causes him or her to relate issues of interpretation, with which he or she may be confronted in a concrete situation, to fundamental questions regarding, among others, the role and function of the law and the possibility of justice. An interpretive theory also situates an interpreter and his or her interpretive endeavours in a legal tradition that, amongst others, includes a particular understanding of matters such as the nature and division of power (*trias politica*) as well as the role appropriate to authorised

146 Ibid 97-99.

147 The term 'objectivism' in this context is of course virtually the opposite of what Michelman has in mind when he speaks of 'objectivist' approaches to constitutional interpretation.

148 WJ Hosten, AB Edwards, F Bosman & J Church *Introduction to South African Law and Legal Theory* 2 ed (1995) 704–705.

149 J Pearsall (ed) *The New Oxford Dictionary of English* Oxford (1998) 1922. The 'consensus theory' in the law of contract is a good example of a theory explaining something. This theory explains that a contract is based on a *concursum animorum* of the parties involved (G Wille *Principles of South African Law* 8 ed (Hutchinson, Van Heerden, Visser, Van der Merwe) (1991) 421–422).

150 Pearsall (ed) *The New Oxford Dictionary of English* (note 149 above) 1922.

(judicial) interpreters of the law in the system. An approach to interpretation is premised on and shaped by theoretical assumptions about the matters just mentioned and by numerous others too. In the context of constitutional interpretation these matters may, for instance, manifest in what Michelman calls ‘an emergent national sense of justice to which ... interpretations ... recursively’ contribute.¹⁵¹

Theoretical assumptions about the matters just mentioned, constituting an interpreter’s *theoretical position* as it were, pilot the procurement of a particular interpretive outcome and not – as Michelman quite correctly points out – the specific approach on which the interpreter relies. To make an assumption involves making a choice. Theories of interpretation emanating from choices thus made are therefore also an ordering or hierarchisation of interpretive preferences – as Michelman also suggests.

A theoretical *position*, which is a theoretical *disposition* at the same time, is not in its entirety consciously or even rationally decided on. Especially ‘jurists in practice’ (including judicial officers) do not habitually devote time to reflect specifically on (and explain or justify) their theoretical positions. Their theoretical positions mostly become visible in the arguments they use to justify particular interpretive outcomes.¹⁵² A theoretical position may nonetheless be reflected on, contested, defended, explained and (consciously) changed. It may also be shared with others although, due to the uniqueness of each individual, no two theoretical positions can probably be identical in every detail. A theoretical position is made up of multifarious interacting factors and forces some of which result from conscious, reasoned choice while others emanate from intuitive perception. Covert and subconsciously held (theoretical) assumptions, precisely because of an interpreter’s uncritical unawareness of them, often have a more decisive impact on interpretive outcomes than overt and consciously reasoned assumptions.¹⁵³

The South African judiciary as a whole has traditionally not assumed a single theoretical position on the interpretation of enacted law, and the theoretical position of a particular judge may, as a matter of fact, vary from case to case depending on the exigencies of each case and the measure of latitude that the law and the canons of construction allow for deciding the specific issues involved in that case.¹⁵⁴ However, there is a theoretical position that has dominated the approach of South African interpreters of statutes (especially the judiciary and legal practitioners) and that has served as template for additional (or *auxiliary*) positions on and approaches to statutory interpretation. This template position blends *literalism* and *intentionalism* into a *literalist-cum-intentionalist* approach. Recognised additional or auxiliary positions can, broadly speaking, be classified as *contextualist* and *purposive*.

There is a popular belief that, since the advent of constitutionalism, purposivism has been replacing literalism-cum-intentionalism as template approach – definitely in constitutional interpretation, but to an increasing extent also in statutory interpretation. In the light of Michelman’s observations about interpretive approaches, this cannot be a sound proposition for the simple reason that it is not the approach relied on that eventually makes all the difference.¹⁵⁵

151 Michelman (note 1 above) 485.

152 Michelman (note 1 above) 485 gives examples of this.

153 S Fish *Doing what comes naturally. Change, Rhetoric, and the Practice of Theory in Legal Studies* (1989) 358.

154 Cf e.g. *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd* 1990 (1) SA 925 (A) 943C–944A.

155 There are other compelling reasons too why this is not a sound proposition – see Du Plessis (note 42 above) 115–119 – but for present purposes I am only referring to the reason that can be deduced from Michelman’s line of argument.

over the last almost ten years it has mainly been 'an emergent [new] national sense of justice'¹⁵⁶ that has accompanied the interpretation of enacted law in South Africa (that is, the supreme Constitution as well as statute law in general) along previously unexplored tracks. The full transformation of the South African law (and practice) of interpretation will still take time. In the meantime insights like Michelman's can help jurists to understand how our relatively new experience of constitutional interpretation is impacting on conventional approaches to and strategies of legal interpretation in general, and the interpretation of enacted law in particular. This, in turn, can help to convince jurists, charged with interpretive responsibilities, who have thus far chosen to remain nervous observers of the transformation of legal interpretation in South Africa, to become level-headed, proactive participants in the process instead.

IV CONCLUDING OBSERVATIONS

As was mentioned at the beginning of this essay,¹⁵⁷ Michelman's CALS address was his response to an invitation to speak about 'constitution adjudicative method'.¹⁵⁸ As we have seen he makes essentially two points about this topic: first, that constitutional interpretation is a decidedly political responsibility and, second, that no single approach to constitutional interpretation can rank highest in a hierarchy of preference. Introducing his address Michelman claims that the second point is obvious while the first point is contentious, and he prefers to start with the contentious point 'because then the obvious one may be more interesting'.¹⁵⁹ Nowhere in the address itself Michelman explicitly elaborates on – or contends for the validity of – this last claim. He leaves it to his readers to forge links between the contentious first and the obvious second points.

I would suggest that in the CALS address Michelman actually makes one inclusive or 'covering' point, namely that 'method of constitution adjudication' does not (and cannot) denote a process of autonomous legal reasoning. Constitution adjudication is so deeply embedded in the (more than just legal) exigencies of the society in which it takes place that no legal method or purely law-like reasoning can purge it from politics. Not only is it impossible to do so but also undesirable to try. Neither legal method nor legal reasoning ensures the best possible constitutional deal in all circumstances, but rather an emergent national sense of justice shaped by public-spirited political discourse and debate and put into action by politically sensible legal and, in particular, judicial decision-makers.

156 Michelman (note 1 above) 485.

157 See section I above.

158 Michelman (note 1 above) 477.

159 Ibid 478.

JOHAN FRONEMAN

THE IMPOSSIBILITY OF CONSTITUTIONAL DEMOCRACY

In 1994, after centuries of strife, South Africans decided to put their faith in constitutional democracy. I do not wish to presume that I can talk on behalf of all South Africans, but most of us, I imagine, thought our new beginning had something to do with individual freedom and having a say in governing ourselves – the things denied to most South Africans before 1994. We started with high hopes of achieving those things, among many other aspirations.

Frank Michelman, to whom we pay tribute to in this book, is an American, a professor at Harvard University. He helped some of us in our quest for something better than we had before 1994. He is an acknowledged expert in constitutional theory, which includes constitutional democracy. Since the start of our brave new world in 1994, he has visited us often, helping us as best he can, I suppose, in that quest for a constitutional democracy.

But, says he, it is better for us to start

by doubting systematically whether constitutional democracy is possible, at least insofar as we take the point of it all to have something to do with individual freedom and self-government.

Doing so should chasten our imagining of, and our hopes for, all the ideas in play here – constitutionalism, democracy and self-government.¹

Are we, a bunch of South Africans, therefore somewhat perverse in paying this tribute to an outsider who wants to chasten our hopes for the future? No, we are not. I am sure that each of the contributors to this compilation has his or her own reasons for paying respect to this stranger who has taught us so much,² but another, general, reason for doing so is that he is right when he cautions us about the possibilities of attaining the ideal of constitutional democracy.

We *should* doubt whether constitutional democracy is at all possible, for only by facing that fundamental doubt do we stand a better chance of getting our constitutional democracy to work, albeit imperfectly.

Why is a constitutional democracy not possible?

Prof Michelman calls it Rousseau's problem, after Jean Jacques Rousseau, who first identified the difficulty of how 'the people' can be said to govern themselves if they do not participate directly in every political decision that affects them.³ The problem, he states, is to find a form of political association in which every human being becomes his or her own governor, providing from within his or her own will and judgment the direction and regulation of his or her own life.⁴

1 FI Michelman *Brennan and Democracy* (1999) 7–8.

2 On a personal level, for him being a generous man: with his time, thoughts and his wisdom. Also for helping me get to spend six weeks at Harvard University in 1999, using his office and reading his books – and saying I could do it again.

3 Michelman (note 1 above) 10.

4 Ibid.

Of course this is a problem only for those who regard the state of living a life of one's own under one's own direction as worthwhile. Michelman certainly regards that as a human good –

certainly not the only human good, maybe hard to defend as the chief human good, but still a human good that is not paltry, and one that it does not seem that a group or community can have ... [n]ot unless you can grasp – and I am betting that you can't, any more than I can, how the distinct human good of being a self-governing subject can accrue to anyone or anything that, try as you and I might, we cannot see as having a consciousness and a will of his own.⁵

By putting it this way he makes it difficult to disagree with him, and I certainly do not.⁶

Those who do not rate individual autonomy or self-government as a human good might not have Rousseau's problem with constitutional democracy, but then, on the other hand, they might have a problem with the idea of constitutionalism and democracy itself. Their (different) problem is perhaps a good place to start our discussion.

Constitutionalism implies some constraint on popular political decision-making by a basic law controlling what laws can be made, by whom, and in what manner.⁷ But why constrain democracy? What can be more democratic than letting the people themselves (individually or as a collective) decide what democracy is? Democracy is, or should be, what democracy does. Sounds good, does it not? But it is nonsense. In order to let 'the people' decide what is good for the people, somebody must decide who qualifies as 'the people' (only those older than 18 years?); how 'the people' should express their views (by voting?); and how 'the people's' views should be assessed (simple majority?). One must thus have rules to start off a democracy. And who decides whether those rules are democratic, unless their democratic nature is already known? Michelman says it 'absolutely is not possible to appoint democracy to decide what democracy is',⁸ and he seems to be right about that too. Democracy as populism cannot be appointed to determine what democracy is. Moreover, in South Africa we have had past experience of what happens when the rules for taking part in democracy are determined in an undemocratic manner. We know it was wrong then and we know it will be wrong to try doing it again. Our knowledge of why it was wrong does not depend on us being told so by any one person or by many people, but stems from what we understand democracy to be.

The human good of individual autonomy expresses itself in respect for the dignity of each person. It grounds the claim of each one of us to the same concern and respect as any other one of us. Concern for it forces justification and accountability onto those who seek to limit the autonomy of some of us for the good of others. It is the concern for the autonomy of *each and every individual* in our country (and not only our concern for ourselves) that makes us care for the good of our society. That is sufficient reason for me to accept that self-government is worthwhile. I will spend no more time defending it.

The stage is now set to consider how a person living in any country that aspires to or calls itself a constitutional democracy should govern himself or herself for there to be true popular sovereignty in that country. Prof Michelman says that to say someone is sovereign in a country

5 Michelman (note 1 above) 13–14.

6 But those who label liberalism as the creed of the selfish, atomistic individual might not want to agree. That is not the kind of liberal I understand Professor Michelman to be.

7 Michelman (note 1 above) 6.

8 Michelman (note 1 above) 34.

is to say that person or entity has the moral title to rule the country in any way he or she decides to.⁹

The ideal of individual self-government can obviously not be satisfied on a day-to-day basis in actual individual participation of government and, practically, such participation starts with schemes of representative government. These schemes are usually set up by or in the fundamental or basic laws of a country (its constitution).

One of the ways in which satisfaction of the ideal of self-government is sought, is by attempting to show how 'the people' participated in the authorship of these fundamental or basic laws. Prof Michelman has written on this and I will refer to two of the variants of the 'constitutional authorship' theories that he deals with. For my purposes I shall call the first the *historical authorship theory*, and the second the *conversation between generations authorship theory*.

The *historical authorship theory* holds that a country's democratic credentials are established by showing that the procedure whereby the fundamental laws were enacted provided for the participation of the people by casting votes in the establishment of those fundamental laws. In the case of the United States of America this would have happened

when conventions in the original states ratified the original Constitution, when state legislatures or conventions ratified its several amendments, and when conventions in territories petitioning for statehood ratified (in effect) the Constitution as amended.¹⁰

In South Africa that would have happened by the adoption of the final Constitution in the Constitutional Assembly, a body specifically elected by the people for that purpose.¹¹

White South African lawyers of my generation will find it rather surprising that this simple and straightforward theory is by no means one that finds widespread acceptance among constitutional theorists. We were not taught much constitutional theory or jurisprudence in our time. To the extent that we were, I suppose we would have accepted that the adoption of the final South African Constitution by the Constitutional Assembly, or even its earlier genesis in negotiations between the then National Party government and the African National Congress, was the 'social fact' that constituted Kelsen's 'Grundnorm', upon which the validity of our subsequent constitutional dispensation rests. We would not have questioned that foundational command further.

But our founding fathers and mothers seemed to have had different conceptions of what was needed for the validity of our Constitution. On the one hand they went to great lengths to ensure formal legal continuity. The parliament of the old regime passed the interim Constitution, which in turn laid down the constitutional principles by which the validity of the final Constitution were to be adjudged by the new Constitutional Court. On the other hand the final Constitution could only be adopted by a representative constitutional assembly elected for the very purpose of constituting and at the same time adopting our new constitutional dispensation.

The latter requirement seems to suggest that what was required for the validity of our final Constitution was that it was the product of democracy, namely the elected constitutional assembly; an instance thus of 'democracy is what democracy does'. But that view, as we have seen, does not withstand critical scrutiny: the credentials of the people in the Constitutional Assembly who adopted our final Constitution, and the manner in which they adopted that final

9 Michelman 'Constitutional Authorship by the People' (1999) 74 *Notre Dame LR* 1605, 1619.

10 Michelman (note 1 above) 25.

11 The Constitution of the Republic of South Africa, Act 108 of 1996, was adopted by a body (in effect the subsequent parliament of that adopted Constitution) elected for drafting a final Constitution.

Constitution, were not determined by an elected democratic institution. The same kind of destructive argument applies to the positivist view that our present constitutional dispensation is merely a continuation of the previous one, because it was formally effected by the adoption of enabling legislation by the previous regime. It requires little imagination to know that the majority of South Africans will reject that view out of hand as a reason why they should accept the new constitutional dispensation as their own.¹²

Self-government requires that democracy be justified for the individual because of that individual's participation in governmental decisions. There is no way in which present day Americans or future generations of South Africans can be said to be the same individuals as those individuals who voted for the adoption of their respective original constitutions. The same applies even if 'the people' are viewed as a collective. Unless some plausible link can be made between the present day 'people' and the founding 'people' to indicate that they are still the same 'people', it cannot be said that we rule ourselves: we are then 'being ruled by a pod with [our] name on it'.¹³ That, of course, is not self-government.

The *conversation between generations authorship theory* seeks to provide that plausible link between the present day 'people' and the founding 'people'. Its foremost exponent is another American, Bruce Ackerman.¹⁴ He argues that the basic unit for the purpose of constitutional fidelity is *the generation*.¹⁵ On any plausible conception of a people's will, he says, that will can never be located only in the present: it must be found in political events over an extended period of time. Proper use of the Constitution (he talks of the American Constitution) requires attention to past historical acts and events: each generation is obliged to honour the acts of the previous generation. The present generation's task is to portray what the previous generation's 'sound and fury' means.¹⁶ Sometimes this discloses the existence of a mobilised majority that effectively transforms the constitutional landscape, although he accepts that this happens only rarely. When it happens, though, subsequent generations that do not experience that kind of fundamental constitutional transformation are bound to respect and abide by what had happened before. What gives binding validity to the Constitution must be sought in historical practice. Although the Constitution is a product of a chronologically ordered series of constitutional creations, each one of these events accepted some, but rejected other, of their predecessors' basic understandings of the Constitution. The present generation must therefore 'talk' or 'converse' with previous generations when the Constitution is construed.¹⁷

If the consent of the governed means the consent of the presently governed, the conversation theory must fail for the same reason as the historical theory, namely that 'they' (the past) are not 'us' (the present).¹⁸ Thomas Jefferson himself said that 'by the law of nature, one gene-

12 Compare Michelman 'Constitutional Authorship, "Solomonic Solutions", and the Unoriginalist Mode of Constitutional Interpretation' 1998 *Acta Juridica* 208, 216.

13 Michelman (note 9 above) 1622.

14 B Ackerman *We the People: Foundations* (1993); *We the People: Transformation* (1998).

15 Cf B Ackerman, 'A Generation of Betrayal' (1997) 65 *Fordham LR* 1519.

16 Ackerman 1523.

17 Ackerman 1520.

18 Michelman (note 9 above) 1624: 'The difficulty is the same as it has ever been (call it "counter-majoritarian", call it "inter-temporal"). They – the generations of the Foundation, Reconstruction, and the New Deal – are not in any obvious or self-proving way in unity or unison with us the living. But given that they are not, for us to submit in any degree to governance by their say so – including not least their say so regarding rules of recognition – is for us not to govern ourselves. What some prior generation *did* as distinguished from what we *might* do is extraneous, it would seem, to our self-government, as long as it remains that they (then) are not us (now).'

ration is to another as one independent nation to another'.¹⁹ History and original understanding provide no easy way out for those of us who think it is an important part of democracy that we must rule ourselves or at least that we must consent to the fundamental laws by which we are governed. If our own self-government is possible, it cannot thus lie solely in us also being constitutional authors of historical documents.

I say 'solely' because it might be said that as first-generation South Africans (who had a say in the making of our new Constitution) we do not have to look further for proof of self-government for ourselves – we 'have as yet no generation gap to worry about', in Prof Michelman's words.²⁰ Apart from that being a rather short-sighted and selfish approach it also disguises the real reasons why we would consider our participation in the founding process of our Constitution to be sufficient to be loyal to its terms. If the reason for our loyalty is that the Constitution came about through democratic means we run the risk of that being exposed as untenable, as we have already seen. If the reason for our loyalty is that the formal trappings of the Constitution's birth traces its lineage further back than the negotiations between erstwhile foes, then we are bluffing ourselves that the adoption of our Constitution was not a revolution, albeit a negotiated one. Could the real reason for our fealty not be that we consider ourselves bound because we agree that the terms of the Constitution are right, morally right, for us and our fellow South Africans?²¹

However, even for us, perhaps not yet hit by the generation gap, things are not as simple as merely being happy with the rightness of our Constitution at its inception. The Constitution is interpreted and applied every day, not only in the courts, but also in many other institutions of government. How can it be said that we exercise self-rule when that happens?

In his book, *Brennan and Democracy*,²² Michelman deals with the answers given by Profs Ronald Dworkin²³ and Robert Post²⁴ to this question. What follows is what I make of his discussion.

Dworkin suggests that the ideal of self-rule can be realised if we understand democracy as rights. To find out whether a country's fundamental laws are democratic in nature one looks at their content, not at the process or manner in which they were made. His is thus a substantive conception of democracy, as opposed to others, like Post, who seek to find the essence of democracy in the way in which fundamental laws are made, in procedural conceptions of democracy. The former says something about the *content* of democracy; the latter avoids that by concentrating only on the *manner* in which the content is arrived at. The importance of the

19 I got the reference from J Rubinfeld 'Freedom and Time' 1998 *Acta Juridica* 291, 298, quoting from J Boyd et al (eds) *The Papers of Thomas Jefferson* 392.

20 Michelman (note 12 above) 232.

21 '[C]onstitutional framers can be *our* framers – their history can be our history, their word can command observance from us now on popular – sovereignty grounds – only because and insofar as they, in our eyes now, were already on what we judge to be the track of true constitutional reason. ... Why do we not dispense altogether with the framers – their authority, I mean, not their wisdom – and look to rightness directly? Beyond respect and gratitude for their wisdom, what is it that we owe them?' Michelman (note 10 above) 1628–9.

22 Cf Michelman (note 1 above).

23 I rely heavily on *Brennan and Democracy* for my discussion. Cf also R Dworkin *Freedom's Law: The Moral Reading of the American Constitution* (1996); *Life's Dominion: An argument about Abortion, Euthanasia, and Individual Freedom* (1993) 'Equality, Democracy and Constitution: We the People in Court' (1990) 28 *Alberta LR* 324; *A Matter of Principle* 1985; *Law's Empire* (1996).

24 R Post *Constitutional Domains: Democracy, Community, Management* (1995).

distinction is said to lie in the avoidance by the proceduralist of the danger of reading his or her own views of the content into what should be neutral and objective.

Dworkin is not too worried about that danger – he says it is impossible to escape from it. A country's fundamental laws are only democratic, he says, if they guarantee and enhance fundamental rights. What counts in the reading of the fundamental laws of a country is that it must be a 'moral' or substantive reading, a reading to determine whether their content accords with fundamental rights. If they do, democracy is served, otherwise not. Furthermore, the fundamental laws include not only the written Constitution, but also key interpretations of its clauses. It will not do to have a written Constitution that accords proper recognition to fundamental rights, but an institution that wrongly interprets and applies the relevant clauses of the Constitution. There are always right answers to the meaning of these clauses and therefore one has to examine both the Constitution and its interpretation to see whether those right answers have been reached.

How does one become a member or participant of a moral reading of a country's fundamental laws in order to satisfy the demands of self-government? By identifying with the community that is involved in lawmaking. In order to do that, the political community must assure each member of equal access to the means for influencing public opinion; an equal measure of consideration for everyone in decisions of public policy; and unhindered opportunity for the development of each individual's moral and intellectual capacity. These are the 'relational conditions' of 'moral membership' in the political community. How are these conditions fulfilled? By an independent judiciary rightly giving effect to the equality and due process clauses in the Constitution. In a single stroke is not only the individual's right to self-government attained; the judiciary's democratic credentials to decide contested constitutional issues are also established.²⁵

Michelman calls it a 'stunning argument'. He nevertheless thinks it cannot succeed. Here is why:

Professor Dworkin says that certain constitutional guarantees give you a warrant in reason for a certain kind of identification of the self with certain political events. That identification must reside in your consciousness, as either belief or a feeling. Say it is belief. What belief? Not the belief that you, the individual, actually make the laws or exert detectable influence on legislative outcomes because one of Dworkin's starting points for this whole discussion is that no-one in large-scale democratic conditions can reasonably believe that. Alternatively, you might believe that sound judicial enforcement of the bill of rights and the rest of the Constitution gives you a reason to abide by the (other, further) laws that are collectively made. That sort of belief is not, however, sufficient to Dworkin's purpose. It would leave us with an account of how you might reasonably come to respect and accept laws made by some agency other than yourself, which is not at all the same thing as an account of how you might reasonably come to regard yourself as lawmaker to yourself. Say, then, that it's not a belief that Dworkin has in mind, but a feeling. What feeling? Say it is a feeling of satisfaction or even pride that you take in lawmaking that is done by an organisation that treats you and your independence and your interests with the respect that is due to a member. Or even say it is a feeling, engendered by such treatment, that you did the lawmaking. Neither of those feelings is the same thing as your having done the lawmaking. Feeling is not doing, and for you to

25 Dworkin *Freedom's Law* (note 23 above) 21–26.

‘identify’ sympathetically with the doer of an act is not for you to have done the act. Dworkin seems to have mistaken the question of what a person thinks, or how a person feels about what someone else has done.²⁶

Where Dworkin sees democracy as rights, others see the guarantee of democracy in proper procedure. Confronted with the reality that a consensus on the content of fundamental laws is an unrealistic expectation, these theorists think that the best we can do is to ensure that the rules on how we arrive at these laws make it possible for individuals to participate in the making of those basic laws. They do not see this kind of constitutional authorship as authorship in the original, historic process of making those laws, but rather as the recurrent remaking of the basic laws by the participation of living individuals in the present political process. It is to two of these theories that I now turn.

Americans are passionate about free speech. It is therefore not altogether surprising that an American academic, Robert Post, finds that the American constitutional culture, as expressed in the treatment of the freedom of speech as almost an absolute virtue, cherishes democracy for the sake of freedom. Speech must be free not because it might express truth, but because the individual must have his or her say, whatever its worth, if there is to be freedom.²⁷ Democracy must be ‘responsive’ to every individual so that the individual can embrace the government as his or her own. This happens when the individual has a proper opportunity to engage in public discourse wherever it occurs, be it in public meetings, public protests or the media:

How do we ensure that the social and legal conditions are of such a nature that the requisite public discourse may properly take place? By rigorously maintaining as part of the basic laws structures of communication that are unrestrictedly open to anyone who wishes to say anything about the national identity or social order. Only then can it be said that the legal rules that flow from that public discourse issue from the individuals themselves and thus represent self-government.²⁹

What then is the difference between Dworkin’s conception of democracy and Post’s? At least part of Dworkin’s conception also deals with each person’s access to the means of influencing public policy, as well as equal consideration of each in the formulation of that policy by the policymaker. Post, I think, would say that there are at least two points of difference. The first and most important is that Dworkin goes much further than he does by claiming that public discourse is a necessary but not sufficient condition of democracy. What is needed further is the right conception of the *result* of the communicative process. As I understand Post, he wants to avoid the claim that he or anybody else already has the right answer to the outcome of a proper procedural discourse to determine the fundamental laws.³⁰ The second is that Dworkin’s claim to satisfy the self-government problem is not a claim that the individual himself or herself partakes in government, but that he or she takes part through his or her agency.³¹ Against that, however, Post relies on individual ‘statistical’ participation, not through a collective.³²

26 Michelman (note 1 above) 31–32.

27 Post (note 24 above) 272–273. Cf also A Meiklejohn *Political Freedom: The Constitutional Powers of the People* (1960): ‘What is essential is not that everybody shall speak, but that everything worth saying shall be said.’

29 Post (note 24 above) 311–312.

30 Dworkin says his super judge, Hercules, will always arrive at the right answer.

31 Dworkin *Freedom’s Law* (note 23 above) 20–26.

32 Cf Michelman ‘Must Constitutional Democracy be Responsive?’ (1997) *Ethics* 706, 709–710.

Does Post's claim of a purely procedural conception of democracy solve the problem of individual self-government? I think not. If Post was asked whether the unrestricted free speech of Americans could be restricted in any manner after an unrestricted public discourse of the kind he favours, his answer, I suspect, would be no. Why not? Because he would, I speculate, have to admit that those individuals whose freedom to participate in the public discourse are restricted by such a restriction would, to that extent, not govern themselves.³³

Thus far we have only heard from the Americans. Better known outside that country are the works of Jurgen Habermas.³⁴

There is a difference in legal thought between those who see the ultimate ground of law in social fact and those who find the ultimate ground in reason or norms. Habermas makes the claim that his 'discourse theory' steers between the pitfalls of facts and norms; between legal positivism and reason. This is a huge claim and not everyone is convinced that he is right when he makes that claim.³⁵ According to Habermas the validity of law derives from two sources: the first being the state's ability to force compliance with the law once it is enacted, and the second the expectation of the legitimacy of the enacted law on the part of the individuals. That expectation of legitimacy is only met, he says, if both the constitutive fundamental laws and the specific laws derived from them are forged in a discursive process in which everybody takes equal part. This discourse takes place both formally (in representative legislatures where the proposed law is discussed, changed and eventually enacted) and informally (in properly constituted civil society where public opinion is formed by everyone having an equal opportunity of making an individual contribution that counts, in the sense of having the potential to influence what may formally become law). It is a never-ending process of recirculation between public opinion, coming from the informal side, and laws, emanating from the formal side.³⁶ Civil society thus operates as a 'kind of standing constitutional pre-convention of the people'.³⁷ Discursive democracy of this kind finds its legitimacy in the interplay between democratically institutionalised opinion-making and lawmaking, not in any actual popular-sovereign subject (and differs in that respect from Post's responsive theory of democracy).

Habermas's claim for this discourse theory is not the relatively modest one that the kind of discourse he proposes is a procedure that will tend to produce the right substantive outcomes, but it is something more, namely that a political system that does not conform to it will not be democratic. It is this absolute claim that is problematic, for similar reasons as those mentioned earlier when Post's responsive theory of democracy was discussed. Habermas postulates a democratic debate that is fair and open to all as a necessary, but not sufficient, condition for democratic legitimacy. It is only sufficient if the debate's own legitimacy is determined by a democratic debate, fair and open to

33 Michelman (note 1 above) 43–44.

34 J Habermas *Between Facts and Norms* (1996). As usual I owe a lot to the explanation of Habermas by others: (always!) Michelman 'How Can The People Ever Make The Laws? (A Critique of Deliberative Democracy)' 1997 LXXIV *The Modern Schoolman* 311; 'Book Review' (1996) 93 *The Journal of Philosophy* 307; Harvey 'The Procedural Paradigm of Law and Democracy' 1997 *Public Law* 692.

35 'The question here is not whether the commitment to a democratic process is itself a substantive value. Of course it is, as both Ely and Habermas freely admit. The question is whether constitutional rights can be derived from this substantive commitment alone – the commitment to (speech-modelled) democracy – or whether instead, as Habermas denies, deliberative democracy can justify constitutional rights only by appealing to an independent theory of substantive rights. Some deliberative democrats have themselves arrived at the conclusion that the "discourse theory" cannot do without this dangerous supplement.' Cf Rubinfeld (note 19 above).

36 Habermas (note 34 above) 408.

37 Michelman 'Book Review' (note 34 above) 313.

all. Who determines that and how is it done? These very questions are ‘reasonably contestable and actually contested, and the acceptability judgments of sundry putatively free and equal persons will not be indifferent to how the contents are resolved’.³⁸

The point that Michelman makes in respect of all these theories is that in the end they all rely on some prior, fixed set of normative principles, a ‘foundational’ conception of constitutional rightness. To the extent that the theories lay claim to being ‘non-foundational’ they are inevitably caught in the trap of infinite regress, as theorists call it.³⁹ I prefer to call it the ‘turtle problem’ (it sounds like more fun):

- What is holding up the world?
- The world sits on the back of an elephant.
- What is holding up the elephant?
- The elephant stands on the back of a very large turtle.
- What is holding up the turtle?
- After that, it’s turtles all the way down.⁴⁰

Of course there cannot be turtles all the way down. Down to where?

So back we come to the paradox of democracy, this time with an added bite. Whoever cares about democracy, it appears, has to take a kind of responsibility for it, even beyond that of knowing what democracy is without waiting for democracy to tell her. She has to take responsibility for becoming a national founder, basic-law-giver, and cultural prophet all rolled up in one. Or else hand that responsibility to the judges.⁴¹

But why would anyone be happy to leave that responsibility to the judges?

Judges have to interpret and apply the necessarily broad and vague provisions of a country’s basic laws, its constitution, whenever they decide constitutional cases. Like all words these basic laws only come into knowable existence when someone gives meaning to them. Outside this meaning there is no physical mirror to hold the words against to see whether their reflection is true or not. The only mirror litigants and their legal representatives have to determine whether their own reading of the legal materials is correct or not, is the meaning that the judge who hears the case gives to those materials. Often the common understanding of everyone involved in the exercise is such that no one thinks it worthwhile to go beyond that common understanding. But quite often there is no common understanding, only ‘persisting reasonable and grave disagreement’.⁴² Reasonable people, including judges, will differ on what the right interpretation of a constitutional principle may be in a given case. Dworkin’s judge, Hercules, may ultimately know the right answer, but it is a fair bet that judges will not be able to agree among themselves who of them is Hercules. And even if they are able to, but give an interpretation to a constitutional clause, which you disagree with or perhaps even find morally repugnant, why should you still feel compelled to give up your self-rule to a judge?

Michelman says that a fair-minded person might reflect on that in the following manner:⁴³

38 Michelman ‘How Can The People Ever Make The Laws?’ (note 34 above) 327.

39 Michelman (note 1 above) 50.

40 As with most of this article, I got this from Frank Michelman too. Cf Michelman (note 12 above) 216 n 18.

41 Michelman (note 1 above) 51.

42 Michelman (note 1 above) 52.

43 Michelman (note 1 above) 56–57.

I see in all reason why basic laws in the form of clauses in a constitution have to be definitely fixed, from time to time, by institutional means, and I see why major interpretations of the clauses similarly have to be definitely resolved for the country, from time to time by institutional means. That being so, and given that there is no possibility that every institutionally authored major interpretation of every basic-law clause can match everyone's sincere and reasonable considered judgment of what is truly, morally right, it cannot be reasonable on my part to reserve my respect for only those interpretations that match my considered convictions of rightness. (Why should I thus privilege **my** own considered convictions over those of others presumably no less sincere and reasonable than I am?)

But, ... I mustn't assume, either, that I am the only fair-minded person around. Countless others must be reflecting just as I am. All of us want there to be some possible feature in a law-making system and its constitutive basic-law interpretations that could allow us all to give our genuine respect, so that we could all generally abide by the ordinary laws issuing out of it, even the ones we variously find to be wrong, without loss of freedom. And all of us know, too, that the feature we are looking for cannot be the entire and perfect conformity of all the basic-law interpretations to considered convictions held by each of us regarding what is required to make such interpretations morally right. Such conformity, we all know, is not possible without oppression, given the burdens of judgment.

Michelman goes on to say that the individual interested in self-government might be happy to entrust the responsibility of deciding reasonably contestable constitutional issues to judges provided that judges make a serious effort at getting the morally right answers to these issues by exposing themselves to the 'full blast of sundry opinions and interest-articulations in society, including on a fair basis everyone's opinions and articulations of interests, including your own'.⁴⁴ This is responsive democracy with a difference, the difference being the individual's belief that there is a better chance at arriving at the right or true answer if the judge listens to him or her and others when deciding a constitutional issue.⁴⁵

In this, my tribute to Frank Michelman, I have tried to set out my understanding of what appears to me to be a central concern of much of his work. I make no apology for the fact that it is a simplified version (I can only hope that it is not a misleading one). It will be familiar terrain for many and perhaps too simplified for their taste. But it was unfamiliar to me, or at least a good part of it, before I became acquainted with Prof Michelman's work. I suspect it may still be unfamiliar terrain for many South Africans, including, perhaps, even lawyers and judges.

Now I am a fan of his. And I think he is mostly right. If he is, the choice that we as South Africans have made in opting to go the way of constitutional democracy was a choice of accepting responsibility. I am not too sure that we always realise what the consequences of that are, or may be.

The best reason for each one of us to accept the conditions of democracy and law is if we agree that the fundamental and ordinary laws of our country, and the interpretation and application of those laws, are right and just. But we should know that the chances of any of us (including judges) getting that right all the time are not too good. Other reasonable people may differ, on reasonable grounds, about what is right and just. And when judges make decisions there are also many cases where there is room for fair and reasonable differences of opinion,

⁴⁴ Michelman (note 1 above) 60.

⁴⁵ Ibid.

where the consequence of a particular decision will affect some people adversely. The reality of a constitutional democracy is therefore that its practice always, in however big or small a measure, results in the exclusion of some. The true test for our choice of constitutional democracy comes when we are the ones excluded by a particular decision.

If we had been given the opportunity, before that decision was made, to present our own ideas of what the right or just answer should have been and we had known our views were given due weight in coming to the decision it might have contributed to an acceptance on our part of our exclusion in a particular case. The contribution of our time to the telling of truth may be that our own ideas of truth should be given the opportunity to influence others, and also to act as an independent check on the ideas of truth emerging from our fellow citizens and our civil institutions, just as theirs will do the same for ours.

What of our judges? To me it seems clear that if they claim the law as an empire rightfully theirs, independent of democracy itself, they will be exposed as nude emperors. They, and lawyers generally, do have a claim though, that the legal process can play its part in a democracy. It is the relatively modest claim that there is a reasonable chance that people who are trained to acquire habits of impartiality, who are expected to be honest and unbiased, who are disciplined to treat like cases alike, and who are formally independent of the executive and legislature, may arrive at fairly reliable answers that accord with our own on what is right and just. And even when they do not, we will accept that their decision was reached in a fair and reasonable manner, having given our views due consideration. The claim is, however, not entirely self-evident. However, if judges are arrogant, obviously biased, intolerant of criticism, do not treat like cases alike, are cronies of government (or opposition parties) and are unable to recognise that they need to justify, in reason, their exclusion of some in the name of justice, then their case is weakened, perhaps even fatal.

I think this is what Michelman tells us: the case for adjudication of constitutional issues by judges in a democracy needs to withstand the scrutiny of our time's contribution to truth-telling or rightness; the testing of truth-ideas in public and open debate. It means the accountability of judges to 'the people'. This may take many forms. The process of how judges are appointed is one, and how their performance may be 'thrown open to the full blast of the sundry opinions on the question of rightness' is another. But it also means the accountability by judges, *to themselves*, of and for their own views of what is right and just, of what they say is the law. Choice and responsibility also confronts the judge.

I do not think it is unfair to say that our history, before we chose constitutional democracy, did not easily lend itself to that kind of 'nonabsolutistic conception of law'.⁴⁶ Our new history of constitutional democracy should. I remember Prof Michelman once saying something to the effect that law in a democracy needs a culture of justification, a culture of reason, and a culture of candour. It seems to me that what he was also saying was that there can be no proper reason, or justification, without candour.

I am tempted to go on, but as Michelman once stated,⁴⁷ 'I think I will just let it go at that'.

46 Cf Michelman, 'Possession vs Distribution in the Constitutional Idea of Property' (1987) 72 *Iowa Law Review* 1319, 1350. Go read this article and ponder the implications of rightness in property issues for our own Constitution.

47 Michelman 'Constitutional Authorship, "Solomonic Solutions", and the Unoriginalist Mode of Constitutional Interpretation' (note 12 above) 234.

JONATHAN KLAAREN

AN INSTITUTIONAL INTERPRETATION OF SOCIO-ECONOMIC RIGHTS AND JUDICIAL REMEDIES AFTER *TAC*

I INTRODUCTION

This chapter aims to use Frank Michelman's comment¹ on the first of the significant South African court decisions on socio-economic rights, *Soobramoney v Minister of Health, KwaZulu-Natal*² to evaluate the two more recent cases, *Government of the Republic of South Africa v Grootboom*³ and *Minister of Health v Treatment Action Campaign (No 2)*⁴. Taken together, these three decisions are important as the first set of encounters between the Constitutional Court and the socio-economic rights in the South African Constitution, which is acknowledged as one of the most progressive constitutions in the world.

After the *Soobramoney* case, Michelman proposed a specific textual interpretation and raised two hypothetical situations to support his argument. Tracking the treatment of Michelman's proposed interpretation, this chapter explores how those two situations would be treated under the jurisprudence of the two later cases. To do so, I employ an institutionalist perspective that values remedies as much as rights and sees the Constitutional Court as one of a number of constitutional interpreters (albeit the last one).⁵ Like Michelman's initial comment, this exploration concludes that judicial enforcement of legislative and executive measures to provide socio-economic rights does not exhaust the possibilities for judicial remedies of socio-economic rights. To this extent, Michelman's interpretation remains valid. Even after *TAC*'s decision concerning section 26(1) and (2) of the Constitution of the Republic of South Africa, Act 108 of 1996, of the health and housing rights, there is a potential interpretive space remaining for judicial remedies of the rights to housing and health beyond *Grootboom*'s reasonability requirement. This relatively small space lies between two much larger arguments. The remaining judicial remedies for these rights are not to be conflated with the interpretation of sections 26 and 27 as a right to immediately claim a minimum core obligation. Neither are all remedies flowing through sections, as solely judicially enforceable through the reasonability requirement of *Grootboom* for executive and legislative action, taken to enforce the con-

1 F Michelman 'The Constitution, Social Rights and Reason: A Tribute to Etienne Mureinik' (1998) 14 *SAJHR* 499.

2 1998 (1) SA 765 (CC) (*Soobramoney*).

3 2001 (1) SA 46 (CC) (*Grootboom*).

4 2002 (5) SA 721 (CC) (*TAC*).

5 J Klaaren 'Structures of Government in the 1996 Constitution: Putting Democracy Back into Rights' (1997) 13 *SAJHR* 3–27.

stitutionally entrenched rights. Most constitutional issues in the enforcement of socio-economic rights will derive from the reasonableness standard for legislative and executive measures articulated in *Grootboom* rather than the judicial remedies explored here. While not very large, especially after *TAC*, this interpretive space remains important to stake out, even if only to explore and use the transformative potential of the South African Constitution.

II MICHELMAN AND *SOOBARAMONEY*

Amongst other talents, Frank Michelman is a careful interpreter of legal texts. His ‘South African Journal on Human Rights’ article in tribute to Etienne Mureinik proves this. In this article published in 1998, Michelman proposes a specific textual argument with respect to the South African Constitution. He argues that section 26(2) should not be exhaustive of section 26(1). As he puts the question: ‘Do the respective subsecs (2) have the effect of carving down the broad language of the respective subsecs (1), so that the latter in effect confer no claims on anyone, beyond the claim to have the state perform the obligation to take reasonable positive measures, within available resources, to provide everyone with access to the listed goods? Or do the subsecs (2) simply specify one of what might be any number of obligations correlative to the rights granted in broad terms by the subsecs (1)?’ Michelman prefers the second of these interpretations, that the rights granted by subsection 1 are broader than those of subsection 2.

Michelman recognises that the facts presented by the *Soobramoney* case are not compelling ones for judicial enforcement of socio-economic rights.⁶ As part of his motivation for his preferred interpretation, Michelman points out two hypothetical situations that indicate the importance of this interpretive issue. Michelman’s first hypothetical is an example of state action: ‘Suppose for example that a municipal authority, acting under general authorization of a provincial statute, has zoned its land in such a way as to make it impossible for private firms to provide inexpensive housing within its borders.’ This hypothetical thus sets up a fairly straightforward instance of state action that serves to exclude the poor. Michelman’s second hypothetical concerns social actors other than the state. ‘Consider for example, a case of common-law controversy over whether a particular water source is to be tapped for industrial use or rather left for domestic consumption by those who lack a good alternative supply of water.’ This hypothetical brings into play the question of the application of the Constitution.

Without attempting to divine the intent of this particular author, why would one make the argument that the right of subsection 1 should not be interpreted to contain merely the content of the duty in subsection 2? One reason may be concern over what could be termed the potential Indian interpretation.⁷ The potential Indian interpretation means the doctrine that the content of socio-economic rights is exhausted by the content that is given to those rights by the legislative and executive branches. This constitutional course of action with respect to socio-economic rights is of course an argument with a long and distinguished pedigree.⁸ Exclusive legislative and executive enforcement of socio-economic rights arguably fits more neatly with

6 Indeed, ss 26 and 27 are perhaps the purest of the socio-economic rights.

7 See Michelman (note 2 above) at 504.

8 See e.g. D Davis ‘The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles’ (1992) 8 *SAJHR* 475.

traditional constitutional understandings of the principle of the separation of powers. But this more limited view of the judicial role in the promotion of socio-economic rights is not the argument advanced by Etienne Mureinik and is not the one carefully taken up by Frank Michelman, in spite of their possible differences of philosophy.⁹ They are both concerned here with safeguarding a judicial enforcement role.

Another concern that could underpin the argument regarding the text of subsections 1 and 2 may be even more fundamental than a worry over the proper judicial role. The relationship between subsection 1 and subsection 2 may be understood to demonstrate the transformative potential of the South African Constitution. There are many potential understandings of the transformative potential of this Constitution. These understandings range from the classically liberal (which is an extant but minority view in the South African context) to the social democratic and, finally, to the more radically democratic.¹⁰ At the risk of overstatement, the relationship of subsections 1 and 2 encapsulates the social dynamic of the Constitution itself. To this extent then, the interpretive battle over the relationship of these two subsections mirrors the interpretive battle over the Constitution itself.

III *GROOTBOOM*, RESPONSES, AND MICHELMAN HYPOTHETICAL 1

Soobramoney was of course only the first of the South African socio-economic trilogy. Michelman's interpretation was thus one proposed (in 1998) without the benefit of the two later socio-economic cases. One way to explore the constitutional development of socio-economic rights interpretation is to ask whether Michelman's hypotheticals posed after *Soobramoney* would be remedied under the later analysis adopted by the Court. Can a plumb line be dropped from those hypotheticals through the later two cases or must the interpretation proposed by Michelman shift?

One can start with *Grootboom* and Michelman's first hypothetical concerning state action that would have the effect of excluding the poor from purchasing houses. The first articulation of the Constitutional Court's reasonableness test for the enforcement of socio-economic rights came in *Grootboom*. That case declared the government housing programme unreasonable to the extent that it had failed to cater for particularly vulnerable groups, in particular groups such as the applicants who were in need of emergency housing relief. If it were applied to Michelman's first hypothetical, would the reasonableness test of *Grootboom* provide an adequate remedy?

Something similar to this question is posed in the course of an interesting pair of articles responding to *Grootboom*, the first by Prof Cass Sunstein of the University of Chicago and the second by Dr Theunis Roux of the Centre for Applied Legal Studies.¹¹ Interpreting *Grootboom*, Sunstein argues that the Court has adopted an 'administrative law model of socio-economic

9 See Michelman (note 2 above) at 505.

10 See Cass R Sunstein 'Social and Economic Rights? Lessons from South Africa' (2001) 11 *Constitutional Forum* 123, T Roux 'Understanding *Grootboom* – A Response to Cass R Sunstein' (2002) 12 *Constitutional Forum* 112, and KE Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146. While I agree with Roux that there is a spectrum here, I would place Klare further to the 'transformative' end of the scale than Sunstein.

11 Sunstein (note 11 above); Roux (note 11 above).

rights'.¹² *Grootboom* is, in Sunstein's view, a nearly complete and certainly very promising answer to the critics of the inclusion of socio-economic rights in a Constitution in the first place. Its development of a reasonableness requirement on the government's measures to enforce socio-economic rights represents 'for the first time, the possibility of providing [judicial] protection [for socio-economic rights] in a way that is respectful of democratic prerogatives and the simple fact of limited budgets.' Like most foreign commentators, Sunstein is thus nearly entirely positive about *Grootboom*.

As Roux points out, local commentators are perhaps better placed to perceive weaknesses in the *Grootboom* approach. Roux raises several critiques of the reasonableness analysis adopted by the Court. Most significantly, he points to a wide and a narrow reading of *Grootboom*'s exercise of 'priority setting'. In the wide reading, a court could assess the reasonableness of the budget priorities of the government. More narrowly, a court could assess only the degree to which the government policies cater for particularly vulnerable groups. In Roux's view, the correct reading of the case is the narrower one. This narrower reading does not read *Grootboom* to announce a judicial power to assess either 'the temporal order in which government chooses to meet competing needs' or the proportion of the national housing budget to devote to the needs of the vulnerable group.

Additionally, Roux applies the reasonableness test to the current land reform programme of the South African government. As Roux details, South African policy in this sector has changed significantly since the early post-apartheid days. This change has shifted the focus from the rural poor to commercial farmers. The initial post-apartheid policy was to provide grants towards land to the poor (those earning less than R1 500 per month). However, since 2000, an additional policy goal of providing grants to commercial farmers has been adopted. The new policy has a sliding scale of benefits that is accessible in the largest amounts by those who are 'relatively well off' (those who are able to raise R400 000 of their own capital). The question thus posed is: Would this policy be reasonable under *Grootboom*? Roux argues it would be. The plan at least includes the rural poor, even if it is only at the bottom of a sliding scale. As long as the poor are catered for, even if not emphasised, Roux reads the reasonableness requirement as being satisfied.

Michelman's first hypothetical differs from Roux's rendition of current land reform policy in one significant aspect. In arguing for the independent content of subsection 1 of the housing right, Michelman posits a situation where poor persons will be effectively excluded from housing, at least in a particular area affected by a municipal law made in terms of provincial legislation. By its feature of exclusion (although also by its feature of limited territory), that situation is thus arguably qualitatively different from the current land reform policy where poor persons are allowed at least some access to land grants through a nationally applicable policy.

12 I agree with Sunstein that it is helpful to use administrative law principles to analyse *Grootboom*. This is striking given the constitutional context of the entrenched rights. Assuming that the study of administrative law is helpful here, the question then becomes what administrative law itself means. As a rough measure, one might identify three models of an administrative law approach to socio-economic rights in a constitutional context: one of doctrine and institutional deference, one of expertise and rationality, and one of interpretation and participation. This is of course only one way of slicing up the administrative/constitutional law world. From this menu, my preference would be for the third approach to administrative/constitutional law. The linkage between the right and the remedy in *TAC* suggests support for adopting the third model of interpretivism. Furthermore, *TAC* does not appear to foreclose the argument that there is a doctrinal space beyond the reach of the general principles of equality/dignity and rationality where the content of socio-economic rights may lie.

One question that reconsideration of Michelman's first hypothetical thus raises is the question of the reach of the reasonableness test with respect to vulnerable groups. Would 'poor persons wishing to live in a particular municipality' be considered a vulnerable group? Would poor persons in general be considered a vulnerable group? The most effective bite of the *Grootboom* test appears to be its analysis regarding vulnerable groups. Only if it were 'unreasonable' for a government measure to exclude poor persons wishing to live in a particular municipality would Michelman's first hypothetical be remedied under *Grootboom*.¹³

IV *TAC*, THE MINIMUM CORE, AND MICHELMAN HYPOTHETICAL 2

In *TAC*, a case where the Court issued an order that the government provide a drug, Nevirapine, helpful in the prevention of mother-to-child transmission of HIV/AIDS, in certain circumstances, the Court's reasonableness analysis demonstrated real scrutiny. In administrative law terms, *TAC* is a hard-look case. Governmental objections were assessed against evidence and found wanting. At least implicitly, alternative courses of action were explored. The case is an example of a willingness to scrutinise the government's decisions closely with respect to access to socio-economic rights.¹⁴

Without embarking on a full assessment of *TAC*, two points of its reasonableness analysis are worth noting. First, poor people were not held to be a vulnerable group as such. Instead, the Court reaffirmed the requirement that state had to take account of the differences between those who can afford to pay and those who cannot.¹⁵ In the Court's analysis, this was a 'consideration relevant to reasonableness'. The treatment of poor people is a factor – not a threshold. Second, the *TAC* Court did address the temporal order of priorities. The *TAC* Court held that it was not reasonable for the government to withhold Nevirapine until research had been completed and the best implementation programme put into operation.¹⁶

One section of the *TAC* judgment also practically directly addressed the question of Michelman's interpretation of the relationship between section 26(1) and (2) and section 27(1) and (2) of the Constitution. In response to the argument of the *amicus curiae*, this issue is the subject of thirteen paragraphs of explicit treatment by the Court.¹⁷ Although it does not form part of the Court's reasoning regarding the substantive issue, the attention devoted to this point by the Court underlines it as an issue that merits treatment on its own as an indication of the Court's philosophy on the interpretation of socio-economic rights. In these paragraphs, the Court rejects the contention that section 27(1) establishes an individual right vested in everyone. Instead, the Court concluded that:

13 It is possible to argue that the exclusion of poor persons wishing to live in a municipality offends either the principle of rationality (*Pharmaceutical Manufacturers of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC)) or the right to equality (*Pretoria City Council v Walker* 1998 (2) SA 363 (CC)) but these arguments would be less likely to prevail than one based squarely on the socio-economic right issue. See J Klaaren 'A Right to a Cellphone?: The Rightness of Access to Information' in R Calland & A Tilley (eds) *The Right to Know, the Right to Live* (Lobby Books, 2002) 18–26.

14 The Court also pointedly adverted to the necessity of transparency: *TAC* note 5 above par [123].

15 *TAC* par [70].

16 *TAC* par [68].

17 *TAC* para [26]–[39].

s 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in s 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the State to ‘respect, protect, promote, and fulfill’ such rights. The rights conferred by ss 26(1) and 27(1) are to have ‘access’ to the services that the State is obliged to provide in terms of ss 26(2) and 27(2).¹⁸

Apart from its grammatical and textual arguments, the clear policy reason behind the Court’s joint interpretation of subsections 1 and 2 concerned the concept of a minimum core obligation. The Court is on record as being against the recognition of a minimum core obligation. In *Grootboom*, the Court argued that it did not have sufficient information to ascertain the content of the minimum core obligation, that any such obligation would in any case be imprecise since the actual needs addressed by the socio-economic right were themselves diverse, and that it was not clear whether the minimum core obligation should have been recognised generally or with regard to specific groups.¹⁹ The Court was happy for the minimum core obligation to be a consideration in the reasonableness analysis but not for it to be recognised (at least at the present moment) as an individual right.²⁰ Since the *amicus* linked the interpretation of subsections 1 and 2 to the minimum core obligation argument, the Court addressed and rejected both in the same breath.

Leaving aside the matter of the minimum core for a moment, at least as a textual matter, the holding of the *TAC* Court seems clear. The first two subsections of section 26 are to be read as one combined subsection. Likewise, the first two subsections of section 27 are to be read as one combined subsection.²¹ The interpretation of the two subsections in both rights is now merged. The one cannot be read without the other. One plus two equals *TAC*.²²

In terms of black-letter constitutional doctrine, it might then seem that *TAC* is a rejection pure and simple of Michelman’s preferred interpretation. Subsection 1 equals subsection 2 and is carved down by it. What could still be argued after *Soobramoney* has finally been laid to rest? That which in Michelman’s view is language that is ‘all too susceptible’, is in the *TAC* Court’s view ‘clearly’ to be interpreted as linking the rights of subsection 26(1) and subsection 27(1) with the obligations of subsection 26(2) and subsection 27(2). The potential Indian interpretation has been avoided through the doctrine of reasonableness. If the transformative potential of the Constitution in the form of the immediate realisation of a minimum core obligation has been reduced, it is a fair and indeed ‘reasonable’ price to pay. Even on such a reading, one might indeed claim that no harm has been done. The reasonableness test, particularly as employed by a Court with the robustness and hard-look scrutiny of the *TAC* decision, might well extend to cover at least the first of the Michelman hypothetical situations.

18 *TAC* par [39].

19 These objections may suggest that the analysis of democratic experimentalism can be profitably applied to the interpretation of socio-economic rights. See M Dorf & C Sabel ‘A Constitution of Democratic Experimentalism’ (1998) 98 *Col LR* 267–473.

20 *TAC* par [34].

21 Indeed, the Court was so emphatic on this point that we should perhaps investigate new legal terminology. We could perhaps designate this new subsection as s 26(1)(2) and as s 27(1)(2). To refer to the broader issue of the proper interpretation of the subsections of both rights, one could use the designation’s 26(1)(2)/27(1)(2)’.

22 See the discussion in the next section below of an interpretation proposed by Danie Brand who does not read the two subsections as effectively combined.

V MATTERS REMAINING

It is, however, not clear if those thirteen paragraphs of *TAC* really answer all the questions asked by Michelman in his 1998 piece. Of course, at some point, textual interpretation becomes an exercise in futility and, frankly, a little desperate. This might especially be the case in the face of a determined policy choice by a Constitutional Court with final interpretative power. Still, there is worth in pushing the interpretive boundaries with socio-economic rights.²³ In this section, I propose an institutional reading of the interpretation of the combined subsections 1 and 2 as well as canvass another alternative interpretation – one that rejects the interpretation of *TAC* as effectively fusing subsections 1 and 2.

To develop the institutional reading, one should begin by distinguishing between two separate legal issues that became intertwined in *TAC*. Michelman's interpretation of subsections 1 and 2 does not refer to the minimum core obligation issue. Yet the *TAC* Court's entire treatment of the relationship between subsection 1 and subsection 2 is headed 'Minimum Core'. In these thirteen paragraphs, the analysis of the Court conflates the issues of a minimum core obligation and the proper reading of subsections 1 and 2.²⁴ This fuses two separate matters of constitutional interpretation. The question of the existence of two separate rights/duties in subsections 1 and 2 is not the same question as the existence of an individual right to a minimum core obligation. Indeed, while the Court has closed off finding a minimum core as part of subsection 1 alone, it has not precluded itself or another court from finding a minimum core obligation in subsection 2 read with subsection 1. David Bilchitz also recognises and terms this aspect of the Court's judgment in *TAC* as a conflation of these two separate issues.²⁵ Of course, one must recognise that even if the Court has confused two issues, it is still the Court. Those thirteen paragraphs of *TAC* can hardly be taken back. And thus this chapter argues that South African constitutional interpretation needs to proceed on the basis that subsections 1 and 2 of sections 26 and 27 are indeed one and the same. So where to now?

Once we recognise and unpack the conflation of the Court's *TAC* analysis, there are two ways to approach the interpretive problem posed by the now must-be-read-together subsections of sections 26 and 27. From one direction, the direction of the minimum core obligation, the issue is still about the content of the right. For instance, once the two conflated question have been separated, Bilchitz essentially argues that the correct interpretive approach is via content, arguing for progressive realisation.²⁶ He makes a distinction between the achievement of the core of a right and its full achievement. This leads Bilchitz to argue that the state is under two separate obligations, one to immediately provide a minimum content and one additional obligation to improve upon that minimum content. There is another direction from which to approach the issue. From this direction of remedies, the approach to this question of inter-

23 Indeed, it was the point of Karl Klare's argument and the example of Michelman's comment that legal interpreters would do well to explore far-reaching interpretive possibilities as part of realising the transformative potential of the South African Constitution. See notes 2 and 11 above.

24 To some extent, this conflation follows the argument of the *amicus curiae*. See 'Submissions of the CLC and IDASA' available at <http://www.concourt.gov.za/courtrecords/2002/tac/tac51.pdf>. The *amicus* argued in favour of a minimum core and that s 27(2) was not exhaustive of the state's duties.

25 D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying a Foundation for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* 1.

26 See also D Brand & S Russell (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2002).

pretation is about institutions. Although to do so reads beneath the text, this approach agrees with Theunis Roux that the concern of the Court here may be explained more easily as a matter of institutionalist legal realism than of lack of interpretative certainty.²⁷

Approached from this second direction, the perspective of institutions, there first appears to be a general point that the Court is making here about the place of remedies in rights interpretation. *TAC* explicitly says that subsection 1 must be read with subsection 2; the right must be read with the remedy. Of course, the converse also holds true. The implication is then that subsection 2 be read with subsection 1. What is sauce for the goose is sauce for the gander.

A general point and a textual point flow from this. First, if subsection 1 and subsection 2 are to be read together as one, then the content of the right can inform the interpretation of the state obligations as much as the extent of the obligations will inform the interpretation of the content of the right.²⁸ Indeed, it is disappointing that there is not greater elaboration of the content of the right in the Court's analysis. The second and textual point concerns the distinction between legislative and executive remedies and judicial remedies. I suggest that, after *TAC*, section 26(1)(2)/27(1)(2) should be interpreted to allow for judicial obligations as well as for legislative and executive measures.²⁹ Judicial remedies may be referred to in subsection 2 as included in the 'reasonable legislative and other measures' the state is obliged to take.³⁰ These remedies may include direct judicial remedies. This interpretive possibility is consistent with *TAC* and should not be excluded. In particular, by distinguishing between legislative/executive and judicial measures in the enforcement of a particular socio-economic right, this interpretation does place two separate obligations upon the state.

The substance of this suggestion can be explored through Michelman's second hypothetical – the safeguarding of adequate water supplies for domestic rather than industrial use as between non-state actors. As with the first hypothetical, we can investigate whether a judicial remedy flowing from subsections 1 and 2 rather than solely from subsection 1 can adequately remedy Michelman's second hypothetical in an appropriate case.

One way to do this is indirectly. One of the considerations that are relevant to the assessment of the reasonableness of state measures to achieve socio-economic rights is the existence of a legal framework. In *Grootboom* and in *TAC*, this legal framework is understood to consist of legislative and executive measures. In principle, there seems no reason why rules of the common law, embodied in the decisions of the courts, should not also be understood as part of the legal framework. For instance, in the context of water rights, the common law may provide the applicable rule of decision in some situations. In such an instance, the policies contained in these rules of common law must be addressed in the context of the constitutional socio-economic right. If the existing common-law rule were not 'reasonable', then a judicial remedy – development of the common law – would apply.

27 T Roux [Public Law Discussion Group Paper], Wits Law School (October 2002). (Copy on file with the author.)

28 Bilchitz makes this argument, pointing out that an enquiry into the reasonableness of the state measures in terms of subsec 2 ought to involve an enquiry into the content of the right in terms of subsec 1: Bilchitz (note 26 above) at 22–30.

29 Such judicial measures would need to be 'reasonable', but one would hope that most judicial action would be such. More significantly, such measures would be subject to the limitations of available resources. This reading does depend on reading the term *state* to include the judiciary. See I Currie & J de Waal *The New Constitutional and Administrative Law: Constitutional Law* (2002) 229 (state includes the judiciary).

30 Here we have the answer to the question of the survival of Michelman's interpretation. He reads subsec 2 as not applying here 'in any ordinary sense': Michelman (note 2 above) at 504. I suggest that the integration of subsec 1 and subsec 2 that occurred in *TAC* changed the prior ordinary meaning of subsec 2.

Somewhat more radically, a second judicial measure is direct. One can argue that, at least where certain conditions have been met, a direct constitutional cause of action remediable through a court with constitutional jurisdiction should be enforced.³¹ This direct cause of action would be apart from individual relief that might otherwise be available to individuals in particular circumstances.³² This direct cause of action would be sourced not in an independent subsection 1 (the textual possibility rejected in *TAC*) but rather in subsection 2 read with subsection 1. This cause of action would be supplemental to legislative and executive measures without terming those measures themselves unreasonable.³³ The necessary conditions would be those that the Court detailed: (1) where the information concerning the obligation of the state was sufficient, (2) where the diversity of needs and claimants was not great and (3) where resources were clearly available. While these caveats are all significant ones and may well be nearly insurmountable in almost all cases, the principle of direct judicial enforcement of socio-economic rights can be understood to survive.³⁴

Having now proposed an institutional/remedial interpretation of subsections 1 and 2 of sections 26 and 27 in the light of *TAC*, the remainder of this section will briefly canvass an alternative interpretation. In a recent article Danwood Chirwa takes a view that differs from both the content-focused and the institutions-focused interpretation of sections 26 and 27.³⁵

31 Indeed, *TAC* note 3 above par [34] may be read to indicate that such a cause of action would be more readily available to specific groups (such as persons in administrative detention) than to everyone generally.

32 See par 26 of 'Submissions' (note 22 above) where the *amicus* recognised that 'in the particular circumstances of a particular case' an individual might show that the section 27(2) state measures entitle that individual to a benefit but distinguishes that result of 'the particular confluence of circumstances of the particular case' from the enforceable right of an individual against the state. The institutional interpretation goes beyond this recognition that individuals may incidentally benefit in the course of litigation under the *Grootboom* reasonableness test. The argument here is for a direct judicial cause of action in appropriate circumstances to be an enforceable right of an individual against the state in terms of subsec 27(2) read with subsec 27(1).

33 In terms of s 8(2), I would argue that the 'nature' of socio-economic rights does not preclude their direct application. See S Liebenberg 'Socio-Economic Rights' in M Chaskalson et al (eds) *Constitutional Law of South Africa* chap 41 (1999 Rev Service 5).

34 Ideally, the South African Human Rights Commission can assist this enforcement. The Commission's role in the interpretation and enforcement of socio-economic rights is often an afterthought. Nonetheless, there is an important role for the Human Rights Commission to play here in general as well as in specifically attempting to meet the Court's conditions for the recognition of the existence of minimum core obligations. The Commission should assist in providing sufficient information, in identifying specific groups of claimants, and in determining the availability of state resources. In a positive fashion, the litigation of the socio-economic rights case of *Grootboom* has already demonstrated the importance of the role of the Human Rights Commission. As Roux's 'Response to Sunstein' notes (note 11 above), it was the intervention of the Human Rights Commission as *amicus* in the proceedings that re-opened the s 26 argument after the lower court's decision and paved the way for the Constitutional Court's *Grootboom* decision. However, the Commission was notably absent in the implementation of both *Grootboom* and *TAC*. See K Pillay 'Implementing *Grootboom*: Supervision Needed' (2002) 3 *Economic and Social Rights Rev* 13 (available at <http://communitylawcentre.org.za/ser/esr2002>). Pillay argues that the Court's settlement order was implemented to a limited extent: 'the parts of the [settlement] order requiring once-off involvement have been fulfilled, [but] the other parts of the order, which require continuous involvement – like maintenance and the provision of services – have not been fulfilled.' The Court's general declaratory order that the state devise and implement a comprehensive housing programme fares even worse in Pillay's view because the order contained no time frames. As far as the monitoring of the SAHRC is concerned, it focussed on the settlement order more than the declaratory order, although it did file a report with the Court over a year after the judgment had been handed down. The Commission has yet to find its role as an institution – within the structure of the Court's analysis of socio-economic rights – that can assist the state (the executive, the legislative, and the judiciary) in respecting, protecting, promoting and fulfilling socio-economic rights.

35 D Chirwa 'Non-State Actors' Responsibility for Socio-Economic Rights: The Nature of their Obligations Under the South African Constitution' (2002) 3 *Economic and Social Rights Rev* (available at <http://communitylawcentre.org.za/ser/esr2002>).

Following international law trends in international law, Chirwa argues that the state has a negative duty, which is sacrosanct and exists independently from the internal qualifiers of progressive realisation and resources etc, to respect socio-economic rights. Even after *TAC*, Chirwa states that it is arguable that subsections 1 of both sections 26 and 27 are both self-standing, at least as regards private actors. Instead of distinguishing between an obligation to provide minimum content and an obligation to improve this minimum provision or distinguishing between legislative/executive measures and judicial measures to meet one single obligation, Chirwa thus distinguishes the obligations of non-state actors from those of state actors.³⁶ Supporting Chirwa's argument, Danie Brand notes that *Soobramoney*, *Grootboom*, and *TAC* leave space for the enforcement of negative duties outside of the scope of subsection 2. Brand points out that each of these three cases was careful to refer only to the positive duties of sections 26 and 27. Still, as Brand notes, this argument 'has its own problems' with respect to the difficulty of distinguishing between negative and positive duties.³⁷

As Danie Brand points out, the Chirwa interpretation that subsection 1 remains self-standing with respect to private actors and the state's negative duties is consistent with the Supreme Court of Appeal's reasoning in *Afrox Healthcare v Strydom*.³⁸ In this case (concerning the right to health care services), the Supreme Court of Appeal did not read subsection 1 of section 27 through or with subsection 2. For purposes of this chapter, the important question to pose with respect to the *Afrox* case may be whether this case was a development of the common law or a direct application of subsection 27(1). If the former were the correct reading, then *Afrox* may be consistent with either the combined interpretation of subsections 1 and 2 as proposed here or with the Chirwa interpretation. Only if *Afrox* were a direct application of subsection 1 of section 27 would it be contrary to the institutionalist interpretation proposed here.

Although to my mind it does not accord with the spirit of the *TAC* case, the Chirwa interpretive line is surely a possible one. Nonetheless, even assuming it is an interpretive possibility, there are two advantages to the institutional interpretation as proposed here. First, the institutional interpretation of a combined subsections 1 and 2 puts the decisions of the judiciary with respect to socio-economic rights in a comprehensive frame of reasonableness. This is appropriate because the common law should be developed and its reasonableness assessed by regarding that common law alongside other state measures. Second, it seems counterproductive to immunise from legislative action the transformation of private action and negative state duties.³⁹ In the realm of socio-economic rights, it is preferable to have judicial action (apart from rare instances of direct application) in a mode where the legislature can work with and refashion the judiciary's necessarily particularistic and case-by-case development of policy.

36 The irony here, of course, is that socio-economic rights advocates use the distinction between private and public as well as the distinction between negative and positive not to argue against the justiciability of socio-economic rights but rather in favour of their at least partial judicial enforcement.

37 See Brand's chapter entitled 'The Proceduralisation of South Africa's Socio-Economic Rights Jurisprudence, or "What are Socio-Economic Rights for?"' elsewhere in this volume.

38 2002 6 SA 21 (SCA), upholding an appeal against *Strydom v Afrox Healthcare* (2001) 4 All SA 618 (T). See D Brand 'Disclaimers in Hospital Admissions Contracts and Constitutional Health Rights: *Afrox Healthcare v Strydom*' (2002) 3 *Economic and Social Rights Rev* (available at <http://communitylawcentre.org.za/ser/esr2002>).

39 If the self-standing subsec 1 were only to be used for indirect development of negative duties of the state and the private actors, then this advantage would also accrue to the Chirwa interpretation. For a more nuanced discussion of legislative flexibility, see S Ellmann 'A Constitutional Confluence: American "State Action" Law and the Application of South Africa's Socio-Economic Rights Guarantees to Private Actors' in P Andrew & S Ellmann (eds) *The Post-Apartheid Constitutions* (2001) 444-480, 452-457.

This would argue for judicial action either through the development of the common law or through assessing the reasonableness of a legislative framework that included the common law. There is of course a distinction between the development of the common law and the direct application of a constitutional right in terms of the legislature's ability to make law regarding the rule adopted by the court. Common law development allows the legislature greater scope to legislate.

VI CONCLUSIONS

The conclusions of this chapter can be stated in the following form:

1. Subsection 1 read with subsection 2 of sections 26 and 27 gives rise to an obligation upon the state that is not exhausted by reasonable legislative and executive measures.
2. As part of enforcing the state's obligation in terms of subsection 1 read with subsection 2, judicial remedies such as changing the common law may be part of the reasonable measures of the state.
3. Apart from reasonable legislative and executive measures, judicial enforcement of the state's obligation in subsection 1 read with subsection 2 may take the form of an individual cause of action in a case where such a judicial measure is reasonable.
4. The argument for a minimum core obligation is not the same argument as the argument that subsection 1 read with subsection 2 of sections 26 and 27 gives rise to an obligation upon the state that is not exhausted by reasonable legislative and executive measures.
5. While it is an interpretative possibility (albeit contrary to the spirit of *TAC*) to read subsection 1 as self-standing and encompassing the negative duties of the state and private actors, the institutional interpretation of the combined subsections is preferable since it will protect and develop these negative duties alongside the legislative and executive framework providing for positive duties relating to socio-economic rights.

IRMA J KROEZE

GOD'S KINGDOM IN THE LAW'S REPUBLIC: RELIGIOUS FREEDOM IN SOUTH AFRICAN CONSTITUTIONAL JURISPRUDENCE¹

The wish to condemn and the desire to understand does not combine easily, and if we ignore the effect of language on understanding we will no doubt tend to condemn only what we do not understand.²

I INTRODUCTION

Freedom is central to most constitutions. In the constitutional context, freedom usually means both personal and political freedom. Personal freedom can be described as the right to decide for oneself the terms of one's life, both individually and communally. It is what Frank Michelman calls self-rule: it 'demands the people's determination for themselves of the norms that are to govern their social life'.³ Political freedom, on the other hand, implies protection against arbitrary government power. This is what Michelman calls law-rule. In most constitutional dispensations both these types of freedom are implicated and the South African Constitution is no exception.⁴ But it is ironic that in most constitutional democracies these two types of freedom are also frequently in conflict with one another. In fact, it is not far-fetched to suggest that they are conceptually contradictory.

Religious freedom is one of the sites where this conflict is often played out. Religion is one of the factors that influence the value-choices made in the process of self-rule. Where these religious choices come into conflict with legislation, the question of priority becomes relevant. This paper deals with the ways in which the South African Constitutional Court has dealt with the question of religious freedom as an illustration of its basic underlying approach to the question of the conflict between self-rule and law-rule. For this purpose Michelman's analysis of the difference between the liberal pluralist and republican approaches will be used as basis. The purpose is not to provide a new theory of religious freedom or to prescribe new ways of dealing with this problem, but to give a critical perspective on current approaches.

1 This essay will also appear in the *SAJHR* with permission of both sets of editors. My thanks to Paul du Plessis and Rena van den Bergh who read an earlier draft and made helpful comments. Any viewpoints and/or mistakes are my own.

2 AJ van der Walt 'Modernity, Normality, and Meaning: The Struggle between Progress and Stability and the Politics of Interpretation' 2000 *Stell LR* 21–49, 226–243 243.

3 FI Michelman 'Law's Republic' (1988) 97 *Yale LJ* 1493–1537 1501.

4 Ss 17–20 of the Constitution guarantee personal freedom and ss 9–16 guarantee political freedom. But many sections guarantee both: see ss 31 and 32.

The first part of this paper is a summary of Michelman's analysis and theory regarding the conflict that he regards as basic to American constitutionalism. The second part is a critical analysis of three Constitutional Court cases dealing with religious freedom. The third part attempts to use the Michelman analysis to provide a different perspective on these cases.

II LAW'S REPUBLIC

American constitutional jurisprudence is based on two premises regarding political freedom. On the one hand it is stated that freedom requires self-government and on the other hand that freedom requires government by laws and not by men.⁵ Self-government or self-rule demands that people themselves determine the values that will govern their social lives. Law-rule demands protection against arbitrary power by prescribing general rules that must be obeyed.⁶ In the case of self-rule a further distinction can be made between negative liberty (the absence of restraint) and positive liberty (that action be governed by reasons or laws one gives oneself).⁷ Positive liberty requires citizenship, negative liberty does not.

It should be immediately apparent that self-rule and law-rule could be contradictory. Some value choices will be in conflict with legal rules that law-rule requires one to obey. The question then is whether self-rule or law-rule will have priority.

Michelman explains how the contradiction is handled in American constitutional jurisprudence with reference to the decision in *Bowers v Hardwick*.⁸ In this case the American Supreme Court upheld the constitutionality of a Georgia statute that criminalises sodomy, even if performed in private with a consenting adult.⁹ Michelman's problem with the decision is its 'excessively detached and passive judicial stance toward constitutional law'.¹⁰ This stance refers to a judicial attitude of deference to external authority. In order to enforce public values as law, the court needs to equate them with recent legislation or with the historical teaching of past authority. Michelman calls this judicial stance 'authoritarian': '(I)t regards adjudicative actions as legitimate only insofar as dictated by the prior normative utterance, express or implied, of extra-judicial authority'.¹¹

This is the direct result of what Michelman calls the court's positivism, which is the result of the fear for the countermajoritarian difficulty.¹² To avoid this difficulty, the court regards itself as an organ of law, not of politics. What is more, '(t)he Court is the servant, not the author, of a prescriptive text'¹³ – therefore it inquires into meaning, not reason or values.

But why should this be the case? The answer, according to Michelman, is a specific view of democracy. In this view, disputed questions of value are understood as a battle of preferences or the exertion of an arbitrary will. Law mediates this battle, but its legitimacy depends on not

5 Michelman 1988 *Yale LJ* 1500.

6 Michelman 1988 *Yale LJ* 1501.

7 Michelman 1988 *Yale LJ* 1503.

8 *Bowers v Hardwick* 478 US 186 (1986).

9 See, in this regard, the South African Constitutional Court's different treatment of this question in *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC). The difference is probably due to differences in the two constitutional texts and not to a basic liberal attitude in the case of South Africa.

10 Michelman 1988 *Yale LJ* 1496.

11 Michelman 1988 *Yale LJ* 1496.

12 See Michelman 'Rejoinders' (1998) 86 *California LR* 469 at 471–472 where he states that the term 'difficulty' might be 'too gentle'. It is rather a case of it being an impossibility.

13 Michelman 1988 *Yale LJ* 1497.

taking sides, which requires the application of extra-judicial authority. Democracy therefore answers this need for extrajudicial authority.¹⁴ Law cannot be part of the battle; its legitimacy must rest on some 'higher' authority.

It seems clear that the question of the conflict between self-rule and law-rule deals with very fundamental issues. At its heart are questions of the relationship between law and politics and the nature of politics.

(a) The problem with liberal pluralism

The attitude of the court in the *Hardwick* case can be regarded as typical of what Michelman calls pluralism¹⁵ or, elsewhere, liberal pluralism.¹⁶ As has already been stated, the pluralist rejection of the connection between law and politics is based on a specific view of democracy. This view is, in turn, based on a specific view of politics.

Pluralism, according to Michelman, is the view that it is impossible for people to communicate effectively and persuasively about values, because there are no common goals or ends.¹⁷ If common goals do exist, they are simply the aggregate of individual goals that happen to coincide. Pluralist politics is therefore a market-like medium for maximising individual preference. In such a scheme, common goods or ends are impossible.

Law, on the other hand, originates in the simultaneous acts of constituting and limiting the people as sovereign. For the law to serve the purpose of constituting a self-governing people, it must of course originate in politics. But if the law is also to effectively limit political will, it cannot remain grounded in politics. Law becomes 'an autonomous force against politics, a force elaborated through its own nonpolitical modes of reason and its own nonpolitical, judicial organ'.¹⁸

But if politics does not provide the legitimation of law, what does? In the pluralist view, legitimacy is derived from some objective idea, for example reason, nature or utility.¹⁹ Once this objective basis is found, law can be severed from politics.²⁰

(T)he only form of discursive validation available for a constitution is the metaphysical-not-political appeal to rationality or natural law: that is, the appeal to that constitution just being, as a demonstrable matter of objective reason, *the right* constitution for a country such as ours is fated to be, populated by folks such as we by nature are.²¹

It seems clear that the pluralist view is based on the individualist and objectivist paradigm of liberalism. Ironically the individualism in this approach did not lead to a liberal outcome in the *Hardwick* case. That is because the severance of law and politics and the elevation of law above politics make the prioritisation of law-rule over self-rule inevitable.

14 Michelman 1988 *Yale LJ* 1499.

15 It is possible to substitute pluralist with liberalist, since the term pluralist has a quite different meaning in South African theory. But, since it is the term used by Michelman, it will be used here.

16 Michelman 'Conceptions of Democracy in American Constitutional Argument: Voting Rights' (1989) 41 *Florida LR* 445.

17 Michelman 1988 *Yale LJ* 1507. See also Michelman 1989 *Florida LR* 445.

18 Michelman 1988 *Yale LJ* 1509.

19 Michelman 1989 *Florida LR* 446: '[F]or liberals, some rights are always grounded in a "higher law" of transpolitical reason or revelation.'

20 Michelman 1988 *Yale LJ* 1511.

21 Michelman 1988 *Yale LJ* 1516.

(b) Michelman's alternative

Michelman rejects the individualism of liberal pluralism. Republicans accept the notion of a common good that is more than the sum of individual interests. This is based on the 'dialogic conception', namely that an individual is at least partly constituted by his or her social situation or context.²² However, this is not communitarianism. The concern is still with the welfare of *individuals*, but never as if they are somehow separate from their social context.²³

Michelman also rejects what he calls classical republicanism. This type of republicanism, for Michelman, is the defence of repressive and discriminatory laws, whose only justification lies in majority views on morality. This morality is 'Judaico-Christian' in nature and represents a commitment by the political community to this kind of morality based on its history.²⁴ Michelman accepts that this kind of 'strong' communitarianism can lead to a very harsh repression of minority views and choices.

Michelman therefore rejects the 'strong' communitarianism of classical republicanism in favour of a different view of politics. This view is based on an idea of politics that includes those traditionally excluded in order to enhance or renovate political communities. As such it involves 'a kind of normative tinkering' – a revision and recognition of normative histories.²⁵

In republicanism the normative character of politics depends on the independence of mind and judgment, the authenticity of voice and, sometimes, the plurality of views in debate.²⁶ Thus, republicanism recognises both the dependence of politics on social and economic conditions and the dependence of these conditions on the legal order. This explains the republican attachment to rights, especially the rights to speech and property.²⁷ Rights are ultimately determinations of prevailing political will.²⁸

Republicanism is also committed to jurisgenerative politics. The only problem is that jurisgenerative politics depends on the existence of normative consensus that seems to deny plurality.²⁹

In reaction to pluralism, republicanism therefore rejects the market approach to politics and instead maintains that the political process can produce a normative doctrine that commands respect *as law*.³⁰ This political process is based on the idea of 'an autonomous public interest independent of the sum of individual interests'.³¹ Therefore justificatory arguments are not based on reason or nature, but on the way in which people in actual social conditions accept the law.³² This is the case because republicanism is based on a specific view of citizenship, namely

22 Michelman 1989 *Florida LR* 444, 450.

23 Michelman 1998 *California LR* 474.

24 Michelman 1988 *Yale LJ* 1495. See EV Mensch 'The Colonial Origins of Liberal Property Rights' 1982 *Buffalo LR* 635–735 on the early history of classical republicanism.

25 Michelman 1988 *Yale LJ* 1495.

26 Michelman 1988 *Yale LJ* 1504.

27 Michelman 1988 *Yale LJ* 1505. Republican thought thus demands some way of understanding how laws and rights can be the free creations of citizens and, at the same time, the normative givens that constitute and underwrite a political process capable of creating constitutive law.

28 Michelman 1989 *Florida LR* 446.

29 Michelman 1988 *Yale LJ* 1506. This is a very narrow view of jurisgenerative politics. The view of Robert Cover, to my mind, seems to require dissensus for the creation of various versions of the law. See R Cover 'Nomos and Narrative' in M Minow, M Ryan & A Sarat (eds) *Narrative, Violence and the Law* (1992) 95–172.

30 Michelman 1988 *Yale LJ* 1509.

31 Michelman 1989 *Florida LR* 445.

32 Michelman 1988 *Yale LJ* 1511.

citizenship as activity, or 'the constant redetermination by the people for themselves of the terms on which they live together'.³³

As a result, the conflict between self-rule and law-rule is less problematic. In fact, self-rule and law-rule become basically the same thing. Law is based on politics and politics is the constant redetermination of the terms under which we live. Law-rule is therefore based on dialogic self-rule.

This approach does, however, translate into a problem regarding constitutional interpretation: how to remain true to the historical text and, at the same time, give voice to those excluded by that very historical text. This is only possible if courts are allowed to change the interpretation in a progressive direction. The traditional view is to see courts as agents of the constitutional past. The court's role is then benedictory, never prophetic.³⁴ According to this traditional view, the only alternative is 'the nihilist menace'.³⁵ Michelman illustrates the two possible approaches of the court by contrasting the *Hardwick* decision with the *Brown* decision.³⁶

(T)he *Brown* Court spoke in the accents of invention, not of convention; it spoke for the future, criticizing the past; it spoke for law, creating authority; it engaged in political argument. In *Hardwick*'s case, the Court did the opposite.³⁷

According to Michelman, plurality in a society always implies indeterminacy. Indeterminacy is the precondition for critique and dialogue.³⁸ In the process of criticism and dialogue, the voices of 'the other' are heard to take part in and/or disrupt the dialogue and this, Michelman argues, leads to political freedom through law.³⁹ A court engaged in republican practice will therefore challenge the self-enclosing and self-satisfied tendency of people to accept their own moral completion, as this will deny the plurality on which transformation depends.⁴⁰

The court's decision in *Hardwick* is therefore suspect in the republican sense. It denies homosexual participation in public dialogue (a requirement for freedom) by reinforcing majoritarian ideas. It also denies freedom by privatising morality.⁴¹ As a result, personal moral choice becomes a matter for criminal law, which undermines freedom.⁴² As Michelman states:

According to what I understand to be a republican ideal conception, politics is a field in which persons reciprocally exercise their capacities for changing and becoming by and through communicative relations. It is a dialogic process of persons overcoming, through confrontation with difference, the moral stasis and self-satisfaction of sameness.⁴³

33 Michelman 1988 *Yale LJ* 1518. This is what CLS'ers would simply call politics.

34 Michelman 1988 *Yale LJ* 1520.

35 See JW Singer 'The Player and the Cards: Nihilism and Legal Theory' 1984 *Yale LJ* 1–70.

36 *Brown v Board of Education* 347 US 483 (1954).

37 Michelman 1988 *Yale LJ* 1524.

38 This is what Michelman calls deliberative politics as the 'argumentative interchange among persons who recognize each other as equal in authority and entitlement to respect'. See Michelman 1989 *Florida LR* 447. Admittedly, this type of politics is not limited to republicanism.

39 Michelman 1988 *Yale LJ* 1528–1529. See also Michelman 1989 *Florida LR* 450, 451.

40 Michelman 1988 *Yale LJ* 1532.

41 Michelman 1988 *Yale LJ* 1533.

42 Michelman 1988 *Yale LJ* 1536.

43 Michelman 1989 *Florida LR* 485.

III THE CONSTITUTIONAL COURT'S APPROACH

(a) *Never on a Sunday*

In the case of *S v Lawrence; S v Negal; S v Solberg*⁴⁴ the Constitutional Court had its first chance to deal with religious freedom. In the court *a quo* the appellants were convicted of various offences in terms of the Liquor Act.⁴⁵ They did not deny the contraventions, but attacked the constitutionality of various sections of the Liquor Act. The allegation was that these sections were inconsistent with section 26 (right to economic activity) and section 14 (freedom of religion, belief and opinion) of the interim Constitution.⁴⁶ All three appellants were convicted as charged and noted an appeal to the Constitutional Court.

In the Constitutional Court the majority dismissed all three appeals. O'Regan J, Goldstone J and Madala J dismissed the appeals of the first two appellants (based on freedom of economic activity), but upheld the third (based on freedom of religion). Sachs J delivered a separate judgment, but concurred with the majority decision.

This discussion will only deal with that part of the judgment that deals with religious freedom and the emphasis will, for obvious reasons, be on the majority decision.

The appellant argued that the purpose of prohibiting the selling of alcohol on so-called 'closed days'⁴⁷ was 'to induce submission to a sectarian Christian conception of the proper observance of the Christian sabbath and Christian holidays or, perhaps, to compel the observance of the Christian sabbath and Christian holidays' [85]. The argument was therefore that the selection of these specific days showed that the legislation had a religious purpose and, as such, constituted an infringement of section 14. In support of its argument, appellant relied on the decision in the Canadian case of *R v Big M Drug Mart*.⁴⁸

Chaskalson P, writing for the majority, distinguished that case from the present one on the basis that the Canadian Lord's Day Act had a 'purely religious purpose and was designed to compel adherence to the Christian Sabbath' [90]. The Liquor Act, on the other hand, is 'materially different in (its) scope and effect', and does not compel sabbatical adherence [90]. The Court then pointed out that alcohol could be sold on closed days in a wide variety of places [90], but not under a grocer's wine licence.

The Court stated that it was aware that certain beliefs might be elevated through subtle means and that this could have the effect that 'adherents of other religions may be made to feel that the state accords less value to their beliefs than it does to Christianity' [93]. But for various reasons the Court did not feel this was applicable in the circumstances. In the first place it was only the selling of alcohol that was prohibited [94]. In the second place, in South Africa 'Sundays have acquired a secular as well as a religious character' [95]. In fact, most people regard Sundays as a rest day, simply because it is convenient to do so.

Because of these two reasons, and because no evidence was placed before the court to indicate how the section interfered with religious freedom, the Court found that 'it is difficult

44 1997 4 SA 1176 (CC). Numbers in square brackets in the text refer to the specific paragraphs in the judgment.

45 Liquor Act 27 of 1989 – hereinafter referred to as the Liquor Act. The offences were selling wine after the hours designated by the license, selling beer and cider while only allowed to sell wine, and selling wine on a Sunday. This discussion will only deal with the last offence.

46 Constitution of the Republic of South Africa, Act 200 of 1993.

47 Section 2 of the Liquor Act defines 'closed day' as meaning Sunday, Good Friday and Christmas Day.

48 *R v Big M Drug Mart* (1985) 13 CRR 64, dealing with the constitutionality of the Canadian Lord's Day Act which compels the observance of Sunday as 'the Lord's day.'

to discern any coercion or constraint ... (because) ... the section does not compel licencees or any other person, directly or indirectly, to observe the Christian sabbath' [97].

Legislation would contravene section 14 if the endorsement of a specific religion 'has the effect of coercing people to observe the practices of a particular religion, or of placing constraints on them in relation to the observance of their own religion' [104]. In this case, however, the connection between Christianity and the restriction on Sunday trading is 'too tenuous' to establish an infringement of religious freedom [105].

Sachs J agreed with the majority view on the tenuous connection between the purpose of the Liquor Act and Christianity,⁴⁹ but argued that the choice of Sundays has a negative symbolic effect:

What comes through as an innocuous part of daily living to one person who happens to inhabit a particular intellectual and spiritual universe might be communicated as oppressive and exclusionary to another who lives in a different realm of belief. What may be so trifling in the eyes of members of the majority or dominant section of the population as to be invisible may assume quite large proportions and be eminently real, hurtful and oppressive to those upon whom it impacts. This will especially be the case when what is apparently harmless is experienced by members of the affected group as symptomatic of a wide and pervasive pattern of marginalisation and disadvantage.

Based on this he found that the provisions infringe section 14 [163]. However, he found that the 'religious favouritism' had to be weighed against the legitimate state purpose of wishing to diminish 'the very palpable and quite terrible consequences of alcohol abuse' [171]. Because the infringement was 'trivial' [168], 'indirect and marginal' [174] and 'slight' [177], while the dangers of excessive drinking are grave [177], the infringement was justified.

O'Regan J, writing for the minority, stated that the Liquor Act infringes religious freedom because, in the first place, it results in indirect coercion.⁵⁰ In the second place, such a 'public endorsement' of one religion is in itself a threat to religious freedom [123]. For O'Regan J the connection between Sundays and the prohibition on trading was not tenuous at all. If the purpose were to cover rest days, all public holidays (and presumably Saturdays) would be included [125]. Nor did she accept that there was a legitimate purpose that could justify the infringement. In the first place the purpose cannot be to restrict consumption of alcohol, otherwise all sale of alcohol would be prohibited [132]. In the second place, it does not prohibit the sale of alcohol on non-religious holidays [132]. As a result, the relevant section of the Liquor Act is unconstitutional.

(b) Sparing the rod and spoiling the child

In the case of *Christian Education South Africa v Minister of Education*⁵¹ Sachs J delivered the unanimous decision of the Court. The case dealt with an application by the appellant to declare

49 *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) par [156]: 'Accordingly, I find it difficult to accept that state-imposed temperance on a common pause day is in itself enough to implicate section 14 simply on the grounds that that day of rest originated from and continues to coincide with the Christian sabbath.'

50 *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) par [120] quoting *Engel v Vitale* 370 US 421 (1962): 'When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.'

51 2000 (4) SA 757 (CC). Numbers in brackets in the text refer to paragraphs of the judgment.

section 10 of the Schools Act⁵² unconstitutional. Section 10 prohibits the administration of corporal punishment to all learners. It was argued that the unconstitutionality lies in the fact that no exception is made for private schools with a Christian basis. The application is therefore for an exemption. The appellants maintained that corporal punishment is an integral part of the Christian faith and, as such, the prohibition is an infringement of religious freedom [2]. The right to administer corporal punishment is usually delegated by the parents to the teachers who act *in loco parentis* [5]. The respondent argued that corporal punishment is ‘inherently violent’ and a degrading assault on personal integrity [12].

Sachs stated that freedom of religion encompasses both the right to hold a belief and to practise that belief. It has both an individual and a collective dimension and ‘is often articulated through activities that are traditional and structured, and frequently ritualistic and ceremonial’ [19]. It also includes the ‘right to be different’ [24], especially if these beliefs are regarded by the majority as ‘unusual, bizarre or even threatening’ [25]. The learned judge then did something that might be regarded as bizarre in itself: he did not find that section 10 does or does not infringe religious freedom, but assumed, for the sake of argument, that it does [27]. There was therefore no finding on the first stage of constitutional inquiry! Nevertheless, he proceeded to the second stage.

Sachs did not find the proportionality analysis any easier. He pointed out that religious conviction is based on faith, while public and private concerns are not and must be judged on reasonableness [33]. The implication seems to be that faith and reason are once again regarded as opposites. Religion can, therefore, not be judged on reasonableness. Although it is not denied that these are seriously held beliefs of the appellants [37] the Court found that:

Just as it is not unduly burdensome to oblige them to accommodate themselves as schools to secular norms regarding health and safety, payment of rates and taxes, planning permissions and fair labour practices, and just as they are obliged to respect national examination standards, so is it not unreasonable to expect them to make suitable adaptations to non-discriminatory laws that impact on their codes of discipline. The parents are not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They can do both simultaneously. What they are prevented from doing is to authorise teachers, acting in their name and on school premises, to fulfil what they regard as their conscientious and biblically-ordained responsibilities for the guidance of their children.

(c) How bizarre is bizarre really?

The decision in *Prince v President of the Law Society of the Cape*⁵³ once again dealt with religious freedom, but this time the cracks began to show. The applicant applied to the Law Society to have his contract for community service registered. In this application he not only disclosed two previous convictions for possession of cannabis, but also indicated his intention to continue using it for religious purposes. The Law Society took the view that his convictions disqualified him on the grounds that he is not a ‘fit and proper person’ and refused to register the contract.

The appellant appealed against this decision on the basis that his religion (Rastafarianism) requires the use of cannabis. The argument in the Constitutional Court was not that all use of

52 Schools Act 84 of 1996 – hereinafter referred to as the Schools Act.

53 2002 (3) BCLR 231 (CC). Numbers in brackets in the text refer to paragraphs in the judgment.

cannabis should be allowed, but that the relevant legislation⁵⁴ is overbroad in that it does not provide for an exemption for religious use. The Court found for the respondents by a very narrow margin of 5 to 4.

The majority decision, written by Chaskalson CJ, Ackerman J and Kriegler J, had no trouble in finding that Rastafarianism is a religion and that the legislation does indeed infringe the religious freedom of Rastafari [97]. The question of justification was, however, a different matter. The majority started off by explaining that cannabis is used for religious purposes by Rastafari, that this use can be extensive [99] and is regarded by most Rastafari as central to their religion [103]. The main problem that they foresaw, was the following:

The religion does not regulate the use or possession of cannabis by its members nor is there any organisation that could provide internal supervision of their acquiring, transporting, possessing or using it. Indeed, on the evidence there are too few adherents of the religion in the country and they are too thinly spread and loosely associated for truly reliable and informative answers to be possible in response to most of the questions posed in paragraph 2 of this Court's order of 12 December 2000.

The Court also pointed out that neither the history of the prohibition of the use of cannabis [105], nor the Court's view on the desirability of the legislation [109] was relevant. 'The only question is whether the law is inconsistent with the Constitution' [109].

Having found that the legislation infringed freedom of religion, the Court then moved on to the justification phase and found that the infringement was justified [111]. The reason for this has to do with the institutional view of religion expressed earlier and goes something like this: There is substantial illicit trade in cannabis. If Rastafarianism had a stronger institutional character, it might have been possible to control the use of the drug by means of a 'carefully controlled chain of permitted supply'. But because this religion lacks that institutional character, there is nothing to distinguish the 'island of legitimate acquisition and use by Rastafari for the purpose of practising their religion' from the 'surrounding ocean of illicit trafficking and use' [130].

The point is therefore that the state's ability to enforce the drug legislation weighs more heavily than the Rastafari's freedom of religion in this proportionality analysis [132, 139]. The interesting thing here is how this religion is set up to fail. If you use a test for religion that is anathema to the very religion you are describing [101], then that very lack of compliance can be the basis for the failure to establish a formal control structure.

The minority judgment started with a thorough explanation of the use and role of cannabis in the Rastafari religion [15-20]. The upshot was to emphasise the centrality of cannabis to the Rastafari. According to Ngcobo J, writing for the minority, religious freedom includes:

- a) the right to entertain the beliefs that you have;
- b) the right to announce those beliefs; and
- c) the right to manifest those beliefs through practice, teaching and dissemination [38].

It was not in dispute that Rastafarianism is a religion, nor that the appellant is a genuine follower of that faith, nor that the use of cannabis is central to that faith. [40] He also pointed out that religion is a matter of faith and belief and what people believe may strike others as 'bizarre, illogical and irrational' [42]. But in this case, the faithful were being forced to choose

⁵⁴ The relevant legislation is section 4(b) of the Drugs and Drug Trafficking Act 14 of 1992 and section 22A(10) of the Medicines and Related Substances Control Act 101 of 1965.

between following their religion or complying with the law. Clearly, then, their freedom of religion was being infringed upon.

In addition, the minority believed that this limitation could be justified. South African society is diverse and the Constitution recognises and protects this diversity. ‘The protection of diversity is the hallmark of a free and open society’ [49]. Although the state has a clear interest in prohibiting drug abuse, at least some forms of use of cannabis by Rastafari can be regarded as harmless. Yet these uses are also prohibited. Similarly, because the harmful effects of cannabis are dosage related, there can be no general prohibition.

Although the need to regulate the use of the drug is recognised, the minority argued that practical difficulties should not be allowed to determine the extent of religious freedom. Briefly stated, although the state’s goal is a legitimate one, the means employed to achieve the goal is not reasonable. As a result the limitation cannot be justified.

Sachs J pointed out that the real difference between the two judgments ‘relates to how much trouble each feels it is appropriate to expect the state to go in order to accommodate the religious convictions and practices of what in this case is *a rather small and not very popular religious community*’ [149 – my emphasis]. Sachs agreed that the Bill of Rights in this case required the state ‘to walk the extra mile’.

Sachs emphasised the mystical importance of cannabis to the Rastafari [152], but also that the section 36 analysis should not set up a no-win situation [155]. Interestingly, he also warned against ‘requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards’ [156].⁵⁵ Legislation should not aggravate the feeling of marginalisation experienced by such groups outside the mainstream [157]. What was more, this type of marginalisation was only possible because the Rastafari is not a strong group, and their interests cannot be ignored:

The Rastafari are accordingly not an established religious group whose interests no legislature would dare ignore. ... The difference of treatment lay not in the nature of the activity or exemption, but in the status of the religious groups involved. One must conclude that in the area of claims freely to exercise religion, it is not familiarity, but unfamiliarity, that breeds contempt. [158]

One cannot imagine in South Africa today any legislative authority passing or sustaining laws which suppressed central beliefs and practices of Christianity, Islam, Hinduism and Judaism. These are well-organized religions, capable of mounting strong lobbies and in a position materially to affect the outcome of elections. [160]

To safeguard the ‘right to be different’ Sachs agreed with the judgment of Ngcobo.

(d) Comment

In the very first case dealing with religious freedom, the Constitutional Court made it clear that there is an important difference between the South African and American constitutions in that the former does not include an ‘establishment clause’ and that American jurisprudence on this point is therefore not necessarily helpful.⁵⁶ However, further analysis shows that there are interesting similarities between the South African and American case law on this point. Sullivan, commenting on American case law, shows that most cases dealing with religious

⁵⁵ Sachs is here quoting *Wisconsin v Yoder* 406 US 205 at 217 (1972).

⁵⁶ See *S v Lawrence* par [99] – [102].

freedom share a number of characteristics.⁵⁷ In the first place they typically deal with forms of oppression subtler than outright persecution. In the second place, most claims dealing with religious freedom are requests for exemption and not for invalidation. In the third place, these claims for exemption come from 'members of relatively politically powerless groups, towards whom the majority is likely to be selectively indifferent or worse'.⁵⁸ In the fourth place these cases work with a very narrow view of 'coercion', based on 'an overstated fear of religious anarchy'.⁵⁹

It is not far-fetched to suggest that the three South African cases discussed above share the same characteristics. In none of the cases was it suggested that the legislation in question could be understood as outright persecution.⁶⁰ The claim was never that the Liquor Act, for instance, was a form of religious persecution. The claim was more subtle and dealt with what one may describe as the negative right to religious freedom. Just as there is a positive right to practise a specific religion, there is a negative right to practise none. As Sullivan puts it: 'Just as Caesar may not command one to transgress God's will, he may not command one to obey it.'⁶¹ The problem with these subtle claims is that, too often, they are regarded as trifling. In some cases the Court even suggests that the maxim of *de minimis non curat lex* should apply.⁶² This indicates a kind of selective seeing and hearing on the part of the Court:

Not to see the (prohibition on Sunday trading) as sending a message of exclusion to Jews, Muslims or atheists is to see the world through Christian-tinted glasses. Majority practices are myopically seen by their own practitioners as uncontroversial ...⁶³

The fact that religious discrimination is seldom overt, results in the fact that most claims are for exemptions and not for invalidation. In South Africa this is also the case. Applicants in all the cases requested an exemption to the various pieces of legislation and not that the legislation be invalidated.⁶⁴ Their claim was not that the laws themselves were discriminatory, but that the facially neutral laws had an impact on religion that was incompatible with religious freedom. The problem is that the absence of direct discrimination often blinds the courts to the effect and outcome of these supposedly neutral laws.

One of the most interesting aspects of these cases is the fact that none were brought by powerful mainstream religious groups. In the Sunday trading case, no religious group was in fact involved and this factor, coupled with the Court's understanding of religious freedom as a positive right, explains the decision in that case. The other two cases were brought by relatively small religious groups. In the corporal punishment case, the appellant represented 196 independent schools with a total of 14 500 pupils. In the context of South African education, that is a relatively small group. Even within the main group of Christianity, this is a fairly small

57 KM Sullivan 'Religion and Liberal Democracy' 1992 *U Chicago LR* 195–223.

58 Sullivan 1992 *U Chicago LR* 216.

59 Sullivan 1992 *U Chicago LR* 218–222.

60 *Christian Education South Africa v Minister of Education* par [21]. (Hereinafter referred to as *Christian Education*.)

61 Sullivan 1992 *U Chicago LR* 197.

62 See *S v Lawrence* par [139].

63 Sullivan 1992 *U Chicago LR* 207. Sullivan is here concerned with the specific case of the placement of a crèche or manger in public offices, but the principle can also be applied to Sunday trading.

64 *Christian Education* par [2]; *S v Lawrence* par [91]; *Prince v President of the Law Society of the Cape* par [112]. (Hereinafter referred to as *Prince*.)

group of people.⁶⁵ And, finally, the Rastafarians are, of course, the most marginal of religious groups.⁶⁶

The importance of this factor cannot be overlooked. It has implications for the idea of politics as dialogue in republicanism. The problem seems to be that participation in the dialogue is premised on power – if the specific group is not powerful enough, its voice will not be heard. In that sense, then, the ‘dialogic convention’ requires power and must be conducted within the majoritarian Judaeo-Christian form. Once again, the ‘politics of form’ determines the debate.⁶⁷

The politics of form is also strongly premised on the Court’s view of coercion. In the Sunday trading case, for instance, Chaskalson P stated: ‘It is difficult to discern any coercion or constraint imposed by section 90 of the Liquor Act ...’⁶⁸ The use of force as the paradigm in deciding these cases⁶⁹ has the effect that more subtle infringements are overlooked. The modern state has far more powerful means of ensuring compliance than force or coercion. It also does not take into account that not only coercion, but also endorsement and acknowledgement of a specific religion might infringe upon religious freedom. As a result only the claims of those who have been coerced are taken into consideration and not those who are merely irritated, offended or stigmatised.⁷⁰ Coercion is easy to see. The enshrining of an unspoken and unacknowledged official religion is far more difficult to pinpoint.

IV CONCLUSION

At best the Constitutional Court’s approach to religious freedom can be described as a typically modern one. Van der Walt describes the modern legal mind in the following way:

(It is) the tendency to search for and the willingness to find and stabilise meaning in and solutions for legal dilemmas (even in situations where meaning is contested or precarious) with reference to what we regard as ‘normal’: established, tried and trusted tradition, convention or consensus.⁷¹

Even when the Court’s theoretical pronouncements seem progressive and open-minded, the practical results of its decision are to affirm the normality or stability of traditional views. For example, the view of what constitutes a religion and what is protected as religious freedom is an affirmation of traditional views and ideas. But that reliance on tradition is itself a political choice ‘to affirm or deny, confirm or reject, include or exclude something’.⁷² However, if one

65 *Christian Education* par [2]. One wonders what difference it would have made had the appellant been, for instance, one of the big Christian churches whose members are in the millions.

66 The Court even acknowledges this fact: cf the characterisation of Rastafari as a ‘marginalised group’ in *Prince* par [157].

67 See P Schlag ‘Normativity and the Politics of Form’ 1991 *University of Pennsylvania LR* 801–932; P Schlag ‘Le hors de texte c’est moi’: The Politics of Form and the Domestication of Deconstruction’ 1990 *Cardozo LR* 1631–1674.

68 *S v Lawrence* par [97].

69 *Christian Education* par [18]: ‘[F]reedom implies an absence of coercion or constraint’, and par [19]: ‘[F]reedom of religion may be impaired by measures that coerce persons ...’. See also *Prince* par [38]: ‘[F]reedom of religion may be impaired by measures that force people ...’

70 Sullivan 1992 *U Chicago LR* 204–205.

71 Van der Walt 2000 *Stell LR* 23.

72 Van der Walt 2000 *Stell LR* 233.

accepts the idea of the ‘interpretive turn’⁷³ in law, such reliance on tradition or convention as a source of stable meaning is suspect, because it implies a reliance on the politics of convention, consensus and tradition.

What then is the view of politics that emerges from these judgments? In Michelman’s terms all three decisions privilege law-rule over self-rule. In every one of the cases, the exemption sought was denied because of some overarching state purpose. This does not mean that any or all of the decisions are necessarily wrong, but merely that they illustrate something about the approach of the Court. It is an approach of deference to external authority, an acceptance of the state as arbiter of what ‘the good life’ should be. In the words of Sullivan, it does not show much faith in faith.⁷⁴

More important, for current purposes, is the fact that the Court in no way measures up to the republican ideal. Where republicanism seeks to include those traditionally excluded (the ‘other’), the Court’s reliance on traditional ideas of what constitutes religious freedom silences those voices. At no point, for instance, is the right *not* to believe ever acknowledged. In fact, the decision in the Sunday trading case suggests an impatience on the part of the Court with what it views as ‘trifling’ issues. But it is only trifling if viewed from a very specific angle and that angle tends to leave the self-enclosing and self-satisfied assumptions unchallenged. As such, the Court fails to live up to the republican ideal.

But the decisions also expose a problem in republicanism, namely the close relationship between power and participation in the republican dialogue. As Michelman points out, politics depends on social and economic conditions that, in turn, depend on the legal order. However, for socially and economically powerless groups (like the Rastafari) participation in public dialogue might be a problem. Major religious groups seldom approach the Court for exemptions, simply because they have enough political clout to have their needs met on the legislative level. It turns out then that power is a prerequisite for participation in the republican dialogue and that raises the old problem of the repression of minority views in classical republicanism.

If the courts are to be involved in ‘a kind of normative tinkering’, and I have no doubt that they should, then claims based on religious freedom should receive much stricter scrutiny when the appellants come from a small or marginalised religious group. I also have no doubt that the concept of religious freedom needs to be expanded so as to include the right not to believe. But that would require a court that is willing to abandon its benedictory role in favour of a prophetic role; a court that is willing to tinker with majority assumptions about stability and normality.

⁷³ The ‘interpretive turn’ refers to the debate about the indeterminacy of meaning in law (as in other social sciences).

⁷⁴ Sullivan 1992 *U Chicago LR* 223.

HANRI MOSTERT

LIBERTY, SOCIAL RESPONSIBILITY AND FAIRNESS IN THE CONTEXT OF CONSTITUTIONAL PROPERTY PROTECTION AND REGULATION

I INTRODUCTION

Assuming that the constitutional protection and regulation of private property in South Africa is a tool for both protecting individual freedom and security and initiating social change,¹ one would expect the judicial task in this regard to be the balancing of individual property protection against the need for regulation and expropriation of property rights for the common good. It is difficult to reconcile the inherent contradictions of such a task. A too stringent focus on individual property rights might do injustice to the broader objectives of national unity and reconciliation espoused in recent legislation, but overemphasising the redistributive character of the constitutional property clause might again result in a neglect of individual security in the context of property law. Frank Michelman, realising the universality of this contradiction, describes it as

a symptom of the classic dilemma of liberal democracy ‘in which political power is envisioned as restrained yet popularly responsive, heedful of the primary values of private and community choice, yet somehow also reflecting the will of the country.’²

This symptom is evident in some of the recent South African court decisions involving an interpretation of the constitutional right to property, according to which people are explicitly protected as owners among themselves and vis-à-vis the state and society, yet implicitly expected to subject themselves to a system that exposes their holdings to the ‘risks of occasional redistribution of values’³ through the regulatory actions of popular government. In this contribution, I review the approach of the South African judiciary and argue that embracing the inherent contradiction at the basis of constitutional property protection in South Africa requires a particular kind of interpretive application of broader constitutional principles. These principles include, in particular, individual liberty and social responsibility, which represent core elements of the South African constitutional order. The work and ideas of Frank Michelman form a valuable counterpoint in such a discussion.

1 Compare F Michelman ‘Mr. Justice Brennan: A Property Teacher’s Appreciation’ 1980 (15) *Harvard Civil Rights – Civil Liberties* LR 304.

2 F Michelman ‘Property as a Constitutional Right’ 1981 *Wash & Lee* LR 1110; Michelman (note 1 above) 296-298.

3 This phrase is borrowed from Michelman (note 2 above) 1110.

(a) Background

Immediately after its enactment, the constitutional property clause⁴ enjoyed considerable attention from scholarly quarters,⁵ but relatively little and mostly superficial attention from the judiciary.⁶ The situation changed drastically over the past year or two, with the handing down of decisions in a number of cases,⁷ amongst others the *Bührmann/Nkosi* cases⁸ and the *First National Bank/Commissioner for the South African Revenue Services* cases.⁹

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- 4 S 28 of the 1993 (Interim) Constitution, s 25 of the 1996 Constitution.
 - 5 E.g. A Caiger 'The Protection of Property in South Africa' in M Bennun & M Newitt (eds) *Negotiating Justice – A New Constitution for South Africa* (1995); W du Plessis & NJ Olivier 'The Old and the New Property Clause' 1997 (1) 5 *Human Rights and Constitutional LJ of SA* 11-15; A Eisenberg "'Public Purpose" and Expropriation: Some Comparative Insights and the South African Bill of Rights' 1995 *SAJHR* 207-221; SBO Gutto *Property and Land Reform* (1995); D Kleyn 'The Constitutional Protection of Property: A Comparison Between the German and the South African Approach' 1996 *SAPL* 402-445; I Kroeze *Between Conceptualism and Constitutionalism: Private-law and Constitutional Perspectives on Property* (1997); C Lewis 'The Right to Private Property in a New Political Dispensation in South Africa' 1992 *SAJHR* 389-430; J Murphy 'Insulating Land Reform from Constitutional Impugnment: An Indian Case Study' 1992 *SAJHR* 362-388; J Murphy 'Interpreting the Property Clause in the Constitution Act of 1993' 1995 *SAPL* 107-130; J Murphy 'Property Rights and Judicial Restraint: A Reply to Chaskalson' 1994 *SAJHR* 385-398; J Murphy 'The Ambiguous Nature of Property Rights' 1993 *JJS* 35-66; T Roux 'Balancing Competing Property Interests' 1993 *SAJHR* 539-548; AJ van der Walt "'Double" Property Guarantees: A Structural and Comparative Analysis' 1998 *SAJHR* 560-586; AJ van der Walt 'Comparative Notes on the Constitutional Protection of Property Rights' 1993 *Recht & Kritiek* 263-297; AJ van der Walt 'Marginal Notes on Powerful(l) Legends: Critical Perspectives on Property Theory' 1995 *THRHR* 396-420; AJ van der Walt 'Notes on the Interpretation of the Property Clause in the New Constitution' 1994 *THRHR* 181-203; AJ van der Walt 'Property Rights and Hierarchies of Power: A Critical Evaluation of Land Reform Policy in South Africa' 1999 *Koers* 259-294; AJ van der Walt *The Constitutional Property Clause* (1997).
 - 6 S 28 of the 1993 (Interim) Constitution was referred to cursorily in *Transkei Public Servants Association v Government of the Republic of South Africa and Others* 1995 (9) BCLR 1235 (Tk) where it was suggested that 'property' could include state contracts, pension benefits and employment rights; and *Transvaal Agricultural Union v Minister of Land Affairs and another* 1996 (12) BCLR 1573 (CC) where the Constitutional Court refused to deal substantively with a claim that parts of the Restitution of Land Rights Act 22 of 1994 were in conflict with s 28 of the Constitution (see T Roux 'Turning a Deaf Ear: The Right to be Heard by the Constitutional Court' (1997) 13 *SAJHR* 216-227). The most substantial discussion of s 28 appeared in *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC), where the Constitutional Court held that s 21 of the Insolvency Act 24 of 1936 did not authorise an expropriation without compensation in conflict with s 28 (see AJ van der Walt & H Botha 'Coming to Grips with the New Constitutional Order: Critical Comments on *Harksen v Lane NO and another*' (1998) 13 *SAPL* 17-41). In the *First Certification Case (In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) the Constitutional Court dismissed three objections against the validity of s 25 of the 1996 Constitution (i.e. that it did not make explicit provision for a right to acquire, hold and dispose of property, that the provisions concerning expropriation and compensation were inadequate, and that there was no explicit guarantee for immaterial property rights), holding that a single universal standard or formulation with which the provision had to comply did not exist, and that its current formulation satisfied the certification criteria.
 - 7 *Groengrass Eiendom (Pty) Ltd and Others v Elandsfontein Unlawful Occupants and Others* 2002 (1) SA 125 (T); *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); *Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd* 2001 (1) SA 500 (CC); *Joubert and Others v Van Rensburg and Others* 2001 (1) SA 753 (W); *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another* 2001 (3) SA 310 (C). *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA), AJ van der Walt 'Moving Towards Recognition of Constructive Expropriation? *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA)' (2002) 3 *THRHR* 459-473.
 - 8 *Bührmann v Nkosi and Another* 2000 (1) SA 1145 (T); *Nkosi and Another v Bührmann* 2002 (1) SA 372. See AJ van der Walt 'Property Rights v Religious Rights: *Bührmann v Nkosi*' 2002 *Stell LR* 394-414.
 - 9 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another* 2001 (3) SA 310 (C); *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and*

(i) *The Bührmann/Nkosi dispute*

The *Bührmann/Nkosi* dispute¹⁰ arose from the right to freedom of religion and the right to family life protected by sections 5 and 6 of the Extension of Security of Tenure Act¹¹ (ESTA). In brief, the Nkosi family's argument was that they were entitled, in terms of section 5 and 6(2) ESTA, to bury a deceased relative in the family burial site on the farm without the farm owner's permission. The landowner, Mr Bührmann junior, by contrast relied on his entitlements in terms of his ownership to justify his refusal to permit the burial, and to demand the granting of an interdict preventing the burial. The High Court per Cassim AJ dismissed the original urgent application for a temporary interdict restraining the Nkosi family from proceeding with the burial, whereupon Mr Bührmann appealed to the full bench of the Transvaal High Court. Here the decision of the court *a quo* was overturned and the temporary interdict granted.¹² In a further appeal by the Nkosi family to the Supreme Court of Appeal, the Transvaal full bench decision was upheld.

Since the ruling, section 6 of ESTA has been amended to avoid interpretational difficulties with burial rights.¹³ Nevertheless, the interesting question arising from the *Bührmann/Nkosi*

Another 2002 (7) BCLR 702 CC. The decision of the court *a quo* is discussed by AJ van der Walt 'Negating Grotius – The Constitutional Validity of Statutory Security Rights in Favour of the State' (2001) 17 *SAJHR* 86-113.

10 Mrs Nkosi and her husband moved to the farm of Mr Bührmann junior in 1966, at which time the farm still belonged to Mr Bührmann senior. The Nkosi family lived on the farm and provided their labour to Mr Bührmann senior. Between 1966 and 1980, a grandson and seven other members of their family were buried on the farm after Mr Bührmann senior had upon their request pointed out an area for this purpose, and the burial ground was duly consecrated according to their cultural and religious beliefs and tradition. The family did not reside on the farm for some time between 1980 and 1990, during which period Mr Nkosi died. Permission was allegedly requested from and granted by Mr Bührmann junior to bury Mr Nkosi in the same burial ground, but due to transport problems this proved impossible and Mr Nkosi was buried elsewhere. (Mr Bührmann junior denied that he was ever requested to have Mr Nkosi buried on his farm.) After 1990, however, Mrs Nkosi and her family again resided on the farm. Her two sons provided labour to the new owner, Mr Bührmann junior, up until their services were terminated after a labour dispute in 1995. After this time, the family was not employed by Mr Bührmann any more, but Mrs Nkosi and one son were allowed to remain on the farm. When the Nkosi son who did not live or work on the farm died in 1999, Mr Bührmann junior refused the family permission to bury their deceased in the family burial ground on the land, and urgently applied for a temporary interdict restraining the Nkosi family from proceeding with the burial.

11 Act 62 of 1997.

12 *Nkosi and Another v Bührmann* 2002 (1) SA 372 (SCA) per Howie JA; Harms, Streicher and Mpati JJA and Nugent AJA concurring.

13 S 5 ESTA reads: 'Subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to – (a) human dignity; (b) freedom and security of the person; (c) privacy; (d) freedom of religion, belief and opinion and of expression; (e) freedom of association; and (f) freedom of movement, with due regard to the objects of the Constitution and this Act.' s 6(2) ESTA sets out the rights and duties of occupiers as follows: 'Without prejudice to the generality of the provisions of section 5 and [subsection 6(1) of the Act], and balanced with the rights of the owner or person in charge, an occupier shall have the right – (a) to security of tenure; (b) to receive bona fide visitors at reasonable times and for reasonable periods: Provided that – (i) the owner or person in charge may impose reasonable conditions that are normally applicable to visitors entering such land in order to safeguard life or property or to prevent the undue disruption of work on the land; and (ii) the occupier shall be liable for any act, omission or conduct of any of his or her visitors causing damage to others while such a visitor is on the land if the occupier, by taking reasonable steps, could have prevented such damage; (c) to receive postal or other communication; (d) to family life in accordance with the culture of that family: Provided that this right shall not apply in respect of single sex accommodation provided in hostels erected before 4 February 1997.' With the commencement of the Land Affairs General Amendment Act 51 of 2001 on 5 December 2001, a further provision (subsection (dA)) was added to s 6 ESTA, to the effect that occupiers now also have the right to bury a deceased family member on the land, in accordance with their religion or cultural beliefs, if an established practice in respect of the land exists and if, at the time of that person's death, he or she was residing on the land on which the

dispute concerns the extent to which landowners can rely on their rights to property to trump the statutorily protected rights that give content to the security of occupiers' tenure in specific cases. Various arguments were raised in the course of the dispute, some relying on the principles of private law property,¹⁴ some on religious freedom, and some on a balance between these aspects. The matter was complicated in some respects by the manner in which the Nkosi family phrased their case. In particular, the Nkosi family's argument presupposed that the right to bury their relatives on the land is an aspect of their religious freedom as protected by ESTA. Secondly, the right to freedom of religion was in this case not regarded as an independent right in itself,¹⁵ but was seen as an element of the occupier's security of tenure through the protection of religious freedom in ESTA.¹⁶ Thirdly, their reliance on ESTA rendered the position of the Nkosi family as statutorily protected occupiers of extreme significance. In effect, it clustered their constitutional rights of religious freedom and property, making them inseparable, and presenting them as a single set of interests for purposes of the balancing of competing interests. For present purposes, the significance of the *Nkosi/Bührmann* dispute is that it raised a number of issues in the context of constitutional property protection and land reform, in which a particular consideration of the constitutional principles of liberty and social responsibility could be important. This will be elucidated in the course of the discussion.

(ii) The *FNB/SARS* dispute

The dispute between First National Bank of SA t/a Wesbank and the Commissioner for the South African Revenue Service¹⁷ concerned the constitutional validity of section 114 of the Customs and Excise Act 91 of 1964, which authorised extrajudicial attachment and sale in execution of one person's property to satisfy the tax debt of another.¹⁸ The most interesting questions raised in this dispute for present purposes concern the applicability and interpretation of the property clause in an area of property law that is not related to land reform at all. As such, the *FNB/SARS* cases contrast starkly with the *Bührmann/Nkosi* dispute. This discussion will focus on a single aspect of the dispute between First National Bank and the South African

occupier is residing. The latter provision was enacted only after the Supreme Court of Appeal's decision in the *Nkosi/Bührmann* appeal had already been handed down.

14 One line of argument emphasises private-law rules about the acquisition of contractual or real rights.

15 Note that the Nkosi family did not rely on the right to freedom of religion per se as protected in s 15 of the Constitution, but preferred to rely on the right as a derivative of their tenure security as afforded by ESTA.

16 The Extension of Security of Tenure Act 62 of 1997 ss 5 and 6. On the purpose of ESTA, see T Roux 'The Extension of Security of Tenure Act' chap 7 in G Budlender, J Latsky & T Roux *Juta's New Land Law* 2nd service (2000) 7A4-7A7.

17 *A quo* decision per Conradie J 2001 (3) SA 310; Constitutional Court per Ackermann J 2002 (7) BCLR 702 (CC).

18 In order to enforce payment of unpaid customs duties and penalties, the South African Revenue Service (SARS), acting in terms of s 114 of the Customs and Excise Act 91 of 1964, detained certain moveable property in the possession (physical control) of two tax debtors, Lauray Manufacturers CC and Airpark Halaal Cold Storage CC. Property is detained on the premises of the debtor, as opposed to it being attached and removed for safekeeping by the creditor. Accordingly, Van der Walt indicates that 'detaining' the property therefore establishes a statutory fictitious pledge, as opposed to the statutory pledge or lien created by attachment and removal. Cf Van der Walt (note 9 above) 87, note 5. Lauray was paying off a considerable amount in outstanding duties and penalties in monthly instalments. To obtain security for the debt, SARS detained (amongst others) a vehicle belonging to First National Bank t/a Wesbank (FNB), who had reserved ownership as security for a credit agreement involved in financing the purchase of the vehicle. Upon the provisional winding up of Lauray, SARS recovered just a fraction of the debt, and it therefore wanted to sell the detained vehicles to recover part of the outstanding balance. The tax debt of Airpark constituted an outstanding amount of customs duty. As security for this debt, SARS detained two vehicles, both belonging to FNB, in terms of a credit agreement, on the premises of Airpark. When Airpark defaulted in paying off this debt in monthly instalments as agreed, SARS attached the vehicles and removed them to a government warehouse for safekeeping prior to their intended sale in execution.

Revenue Service, namely the argument that the detention and sale in execution of the vehicles belonging to FNB, who was not a tax debtor, was in conflict with the property clause in section 28 of the Interim Constitution or section 25 of the 1996 Constitution.¹⁹

The arguments raised by the court *a quo*'s decision are interesting in that they link issues from private property law with some aspects of constitutional property protection, and some aspects of constitutional law in general. For example, the High Court per Conradie J, assuming that a limitation as envisaged by the constitutional property clause would arise only once the detained goods had been sold,²⁰ equated the detention mechanism in the Customs and Excise Act with mechanisms from private law (i.e. the common law lien and the landlord's hypothec), which could defeat the rights of the owner of goods encumbered with security rights.²¹ The court also embarked on a consideration of the legitimacy of taxation generally, without this issue being raised by either of the parties. It was assumed that taxation could not amount to deprivation or expropriation,²² and the court remarked that 'if this seems inequitable, the answer is that there is no equity about a tax.'²³ Thus, the question about the equitability of extending the detention procedure to the property of third parties was linked to the wider question about the legitimacy of taxation in general.

The Constitutional Court, per Ackermann J, disposed of many of these issues in a quite striking judgment. In the course of its decision, the Constitutional Court touched upon some of the constitutional principles underlying all enquiries about the constitutional justifiability of contested actions. In particular, especially as far as the inquiry into constitutional justifiability based on the property clause is concerned, a specific reliance of the principles of 'democratic values' and 'social justice'²⁴ was noticeable. These concepts will feature in the following discussion of the manner in which the constitutional principles can be applied to achieve a specific kind of interpretation of the constitutional property clause which will further the objectives of the South African constitutional order.

(b) Focus on constitutional principles

At first glance, the two examples from case law discussed above seem to have nothing in common. The former was the consequence of a conflict between two sets of property rights, and between property rights and freedom of religion in the context of the land reform programme. The latter resulted from a constitutional validity challenge of statutory provisions authorising extrajudicial attachment and sale in execution of one person's property for the satisfaction of another's tax debts. Undoubtedly, these cases raised many issues around constitutional property protection with regard to which judicial attention had long been overdue, like the balancing of conflicting interests, both private and public, and the interplay between the various stages of a constitutional scrutiny inquiry. Because of the scope of this

19 Apart from the constitutional challenge to s 114 of the Customs and Excise Act on the basis of the constitutional property clause, the provision was also challenged on the basis that the administrative collection of customs duty, without a court pronouncing on liability, was arguably in conflict with s 34 of the interim Constitution or s 22 of the 1996 Constitution. In the Constitutional Court (par [25]) it was pointed out that the 1996 Constitution is applicable to both aspects of the dispute.

20 High Court decision, (note 9 above) 327D-E.

21 High Court decision, (note 9 above) 327C.

22 High Court decision, (note 9 above) 328G-H.

23 High Court decision, (note 9 above) 328F-G.

24 Constitutional Court decision, (note 9 above) par [53] et seq.

contribution, it is impossible to deal with each of these issues in sufficient detail, but the main focus of my discussion necessitates at least some form of review of these issues. In this review, I shall concentrate on the judiciary's understanding and employment of the constitutional principles of individual liberty and social responsibility in reaching the respective decisions. More specifically, the interplay between the various stages of the constitutionality inquiry in the context of property forms the framework for the inquiry. This requires a discussion of the process of constitutional scrutiny of private property and its regulation in South Africa, and an analysis of the relevance of concepts like liberty and social responsibility for the scrutiny analysis of property.

II LIBERTY AND SOCIAL RESPONSIBILITY IN THE CONSTITUTIONAL SENSE

Michelman²⁵ equates the protection of individual freedom with the endorsement and safeguarding of human interests, pointing out that human interest is the correlative of human freedom. The same idea seems to be reflected in the new South African constitutional order, which supports the rule of law in conjunction with the idea of constitutional supremacy,²⁶ in a manner reminiscent of the German constitutional principle of the '*Rechtsstaat*.'²⁷ This entails a general support of individuals' claims for judicial protection of their liberties, and judicial control over state power.²⁸ In very broad terms, adherence to the various component aspects of the rule of law and constitutional supremacy presupposes the prevalence of individual independence against uncontrolled state power, thus establishing a space in which individual freedom is constitutionally protected. Individual freedom under a liberal constitution therefore entails the acknowledgement that individuals are capable of taking charge of their minds and lives, and making their own judgments about what is good and what is right.²⁹ However, the exact content of individual freedom still very much depends on the kinds of interests underlying specific constitutional liberties.³⁰ Michelman supports an 'interest-sensitive' approach to individual freedom³¹ that provides a fluid measure for evaluating similar, com-

25 F Michelman 'Liberties, Fair Values and Constitutional Method' (1992) 59 *Univ of Chicago LR* 94.

26 S 1(c) of the Constitution.

27 For an exposition of this view, see L Blaau [sic] 'The *Rechtsstaat* Idea Compared with the Rule of Law as a Paradigm for Protecting Rights' 1990 *SALJ* 76-96.

28 Relevant aspects of the rule of law and constitutional supremacy include the separation of state powers, the legality principle, legal certainty, protection of legitimate expectations according to the principle of trust, and the principle of proportionality in constitutional adjudication. For an exposition of the South African Constitution's adherence to these elements of the rule of law, see F Venter 'Aspects of the South African Constitution of 1996: An African Democratic and Social Federal *Rechtsstaat*?' 1997 *ZaöRV* 51-82; H Mostert 'The Constitutional State, the Social State and the Constitutional Property Clause – Observations on the Translation of German Constitutional Principles into South African Law and their Treatment by the Judiciary' 2002 *ZaöRV* 347-390.

29 F Michelman 'Socio-political Functions of Constitutional Protection for Private Property Holdings (In Liberal Political Thought)' in AJ van Maanen & AJ van der Walt (eds) *Property Law on the Threshold of the 21st Century* (1996) 435; F Michelman 'The Subject of Liberalism' (1964) 46 *Stanford LR* 1807.

30 Michelman (note 25 above) 95 ff. Michelman divides the various liberties into three classes, namely expressive liberties, economic liberties and proprietary liberties.

31 'In an interest-sensitive view, constitutionally guaranteed liberties are not simply formal entitlements ... Instead, liberties then also take on practical dimensions of magnitude and value.' This is described somewhat later on in the same article: 'Given that the reason for protecting liberties is regard for the corresponding interests, a constitutional scheme of liberties cannot reasonably or lawfully blind itself to the distributive relations of the liberty interests that it cherishes and, in a sense, creates. And given further that these liberty interests have

peting liberties and different, competing liberties on a case-by-case basis, without amounting to a ranking of constitutional liberties.³² As for the protection of individual property, the individualist view of constitutional liberty indicates that the protectable interest here is the maintenance of the political power associated with wealth.³³

However, individual freedom (and its endorsement in the rule of law) does not by itself address the socio-economic disparities in society. Hence the state is authorised, under some circumstances, to interfere in the social order, and individuals are expected to tolerate (sometimes quite substantial) inroads on their liberties. I refer to this phenomenon as the social state, in the sense of the state's support (through policy and legislation) of values underlying the constitution and pertaining to social justice, social security and the improvement of living conditions.³⁴ Michelman,³⁵ in discussing socio-political justifications for constitutional property protection, refers to the tempering of the individual's freedom from coercive governmental presence as the 'distributive requirement of liberal political justification,' and explains:

everyone has reason to accept a regime that treats him or her fairly, judging what is fair in light of certain hard facts of political life that all who are reasonable must accept. These facts include the primordial demand of each individual for the same consideration and respect as others receive, the existence of deeply conflicting interests and perceptions, the necessity to resolve on some regime or other for dealing peacefully with such conflicts ... and the impossibility of doing so unless ... everyone approaches the question in a spirit of reasonableness, looking for a resolution that others who are also trying to be reasonable must regard as fair.

Michelman indicates further that a constitutional scheme of proprietary liberty is incomplete if no attention is afforded to the distribution of wealth, in a manner that takes cognisance of qualitative distinctions among wealth holdings.³⁶ This entails that a private-property regime must include certain distributional ('second-generation')³⁷ and environmental ('third-generation')³⁸ assurances as far as property rights are concerned.

At this point, the dichotomy between individual freedom and social responsibility in an application of constitutional principles to the protection of private property should be evident. On the one hand, as Michelman indicates, citizenship is dependent on the endorsement of both individual freedom and social responsibility. On the other hand, the inherently contradictory nature of these terms might render any attempt at protecting or regulating property ineffective. As the *Nkosi/Bühmann* cases illustrate, there might be structural conflicts of interest between landowners on the one hand and persons with other rights to (or interests in) the land in a specific dispute, where the legislature – or even the judiciary – might be expected to make

dimensions of value, the scheme cannot reasonably blind itself to the configurations of the values – the distributions of the values among persons – of these liberty interests.' Michelman (note 25 above) 97-98.

32 '[P]eople's freedom to say what they please is no more foundational to personal or societal fulfilment than are their proprietary securities or their freedoms of choice in productive endeavors.' Michelman (note 25 above) 96.

33 Michelman (note 25 above) 99.

34 For a more detailed exposition of the state's support in this regard, see Mostert (note 28 above) 347-390, E de Wet 'Can the Social State Principle in Germany Guide State Action in South Africa in the Field of Social and Economic Rights?' 1995 *SAJHR* 30-49; E de Wet *The Constitutional Enforceability of Economic and Social Rights – The Meaning of the German Constitutional Model for South Africa* (1996).

35 Michelman in Van Maanen & Van der Walt (note 29 above) 435.

36 Michelman (note 25 above) 99.

37 I.e. '... claims on the public and its governmental agents for guaranteed satisfaction of certain material needs and related opportunities.' Michelman in Van Maanen & Van der Walt (note 29 above) 436.

38 I.e. '... claims to governmental regulation of property deployments by owners as from time to time discovered to be necessary to prevent unacceptable harms to non-owner interests.' Michelman in Van Maanen & Van der Walt (note 29 above) 436.

political decisions concerning the rights preferably to be protected. Moreover, there might be a conflict of interests between those holding property on the one hand, and the state as agent for ensuring the public weal on the other. This much is apparent from the *FNB/SARS* cases. Under these circumstances, individuals might want to question the state's ability to decide on their behalf as to what is right, or good, or fair in particular circumstances.

In one sense, as far as constitutional property protection is concerned, the tension between liberty and social responsibility surfaces in the distinction between what Michelman calls 'negative' and 'affirmative' property.³⁹ 'Negative' property refers to claims 'to be let alone to hold, keep and enjoy what you can lawfully acquire on your own', whereas 'affirmative' claims to property refers to the dependence upon the active assistance of others in obtaining or enjoying the use of wealth.⁴⁰ The latter type of claims is necessarily linked to some extent with social welfare rights, and necessarily presupposes the exercise of at least some measure of social responsibility on the part of citizens. The former type relies strongly on the idea, encompassed by the rule of law, of security of property holdings as a matter of private self-interest and general political concern.⁴¹ It furthermore endorses the idea of individual freedom as fundamental to a constitutional order in which private property is protected.⁴²

Although it is possible for a legal system strongly endorsing negative property to exclude affirmative claims to property altogether, the relationship between affirmative and negative property within specific jurisdictions is often more dialectical. Ideally, the interaction between the different constitutional principles can be described as relationships of challenge and interdependence, in an ongoing effort to create a balance between freedom and equality, or to determine the boundaries of an individual's liberties by defining the extent of such an individual's responsibilities towards society. Michelman⁴³ describes these relationships of interdependence in the context of the different functions of the state as follows:

The Constitution contemplates lawmaking. It entrusts to lawmakers a range of legislative discretion. It does so, we have to presume, out of a regard for justice and welfare. Presumably out of a like regard, the Constitution also establishes certain rights and otherwise limits lawmakers' discretion to make laws. The Constitution calls upon courts of law to help effectuate these rights and other limits on lawmaker discretion by adjudicating claims of transgression. Yet it also calls upon the courts, in their adjudications, to support and defend the discretionary authority of lawmakers.

In this view, the judiciary is called upon to maintain a balance between discretions, rights and limits. Moreover, as Michelman explains elsewhere,⁴⁴ a regime designed to distribute lifetime resource stakes equally has to ensure that gains fairly earned do not 'swell and harden illicitly into self-reinforcing structural advantages'. To this effect, provision must be made against 'coercive and exploitative deployments of local advantages' and against 'the freezing of

39 F Michelman 'Tutelar Jurisprudence and Constitutional Property' in EF Paul & H Dickman (eds) *Liberty, Property and the Future of Constitutional Development* (1990) 128.

40 Michelman in Paul & Dickman (note 39 above) 128.

41 F Michelman 'Possession vs Distribution in the Constitutional Idea of Property' (1987) 72 *Iowa LR* 1347.

42 "'Liberty" and "property" seem to define, exactly and exhaustively, the field of individual substantive rights. They are the very words which, above all others, our legal tradition has used to mark the sphere in which individual will and private preference are sovereign, in which legislation that would override the choices of individuals is, for just that reason, presumptively objectionable.' F Michelman 'Process and Property in Constitutional Theory' (1982) 30 *Cleveland State LR* 579.

43 Michelman (note 25 above) 93. Footnotes omitted.

44 Michelman in Van Maanen & Van der Walt (note 29 above) 441.

temporary advantages into class hierarchies or other structural inequalities'. In a proper symbiosis, the principles of liberty and social responsibility can play an important role in hedging in structural inequalities still prevalent in the property regime.

Through the interplay of the liberty and social functions of property and the legislature's scope to regulate property, a system of differentiated (layered or 'scaled') protection of various property interests can develop, based on the social relevance of various kinds of property rights.⁴⁵ If the function of property in a given instance is primarily to secure individual liberty in the sense of material well-being, independence and freedom, impositions on property must operate within a narrower margin. If, however, the function of property in a particular instance is to promote social benefit – or rather, if it involves the social duties of the state and its power to control the dangers and disadvantages of autonomous private use of property – the legislature's powers to determine the content and limits of property protection should be more extensive.⁴⁶ Ownership of means of production, which provides power over third parties, would typically be subject to a stricter level of scrutiny,⁴⁷ as would landownership, which – land being the indispensable but limited resource it is – cannot be made completely subject to the free will and power of an individual owner. In a just legal and social order, the public weal is much more closely connected to land than to many other kinds of patrimonial interests.⁴⁸ A review of the process of constitutional property protection and regulation in South Africa will be instructive of this argument. The two recent South African disputes outlined above are employed to illustrate it.

III CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY

Michelman indicates⁴⁹ that the constitutional protection of private property must be understood as comprising at least two possible notions: (i) the protection of specific relationships of control, or property 'holdings';⁵⁰ and (ii) the protection of a specific property 'regime' (i.e. 'a class of institutional – basic-structural – states of affairs')⁵¹. Constitutional protection of private property presupposes the existence of a judiciary capable of providing relief against specific infringements on property by the government (even though government is authorised by duly enacted legislation to perform certain actions which purportedly infringe private property rights). It also presupposes that the judiciary's intervention is justified by

45 Compare the German example. In the context of the property guarantee of the German Basic Law, for instance, legislature is assigned the task of putting the social model of property, the normative elements of which are stipulated in article 14 I 1 GG and article 14 II GG, into practice. *BVerfGE* 52, 1, 29. See also *BVerfGE* 37, 132, 140, where the dialectic relation between constitutionally guaranteed freedoms and a socially just property order is mentioned.

46 Compare *BVerfGE* 53, 257, 292.

47 See *BVerfGE* 79, 29, 41; B Pieroth & B Schlink *Grundrechte-Staatsrecht II* 14th ed (1998) marginal note 933. HJ Papier 'Artikel 14' in T Maunz & G Dürig *Grundgesetz Kommentar* (1994) chap 14 marginal note 298 ff.

48 *BVerfGE* 21, 73, 82 ff.; *BVerfGE* 52, 1, 32 ff. See similar reasoning in *BGHZ* 23, 30, 35; *BGHZ* 80, 111, 116; *BGHZ* 90, 4, 15.

49 Michelman in Van Maanen & Van der Walt (note 29 above) 449.

50 Michelman in Van Maanen & Van der Walt (note 29 above) 443 calls these 'sundry instances of ownership ... pursuant to an established proprietary regime' and refers to a 'No Trespassing' sign as example thereof.

51 Michelman in Van Maanen & Van der Walt (note 29 above) 442 uses an extract of *State v Shack* 1971 58 NJ 297, 277 A.2d 369 ('Property rights serve human values. They are recognized to that end, and are limited by it.') to indicate that sometimes a general social regime of a specific kind is at stake, rather than a particular item owned by someone specific.

reference to a body of 'higher' positive law (the constitution); and that society generally perceives the judiciary to be legitimate.⁵² In this sense, infringements on property may refer either to infringements on the particular property 'regime' or to 'holdings' as such.

Constitutional protection of the property 'regime' in a jurisdiction priding itself in being liberal, would entail that the judiciary is engaged in enforcing affirmative duties upon lawmakers to maintain the content of other areas of the law⁵³ within a constitutionally permitted private property range, however uncertain or controversial the boundaries of such a category might be.⁵⁴ Judicial intervention for the protection of a specific property 'holding,' however, necessarily has an effect on the property 'regime' espoused by a specific constitutional order.⁵⁵ If property protection under the new South African constitutional order is a precondition for a fair, democratic systematisation of the principles of social ordering,⁵⁶ it will be necessary to analyse the type of protection afforded to property 'holding' in view of its influence on the specific property 'regime' that requires protection. The assumption that the 'regime' to be protected is one in which property acts as a tool to promote individual liberty and to initiate social transformation provides us with a standard with which to measure the success of the judiciary in protecting property 'holdings'.

In discussing the manner in which the South African judiciary can enforce the legislature's duty with regard to constitutional property protection, it is necessary to identify the factors influencing such protection in South Africa, both on the level of 'regime' protection and where 'holding' protection is concerned. An important point to consider is the South African judiciary's staged approach to constitutional scrutiny. Two related aspects that deserve attention are (i) the manner in which the constitutional provision for property protection is formulated; and (ii) the manner in which reliance on constitutional protection of property is limited by the Constitution.

(a) Staged approach towards constitutional scrutiny

A consideration of three basic questions determines whether a specific infringement on private property can pass constitutional scrutiny:⁵⁷ (i) whether the affected property right is protected by the constitutional property guarantee at all; (ii) whether the action curtails the freedom of the particular holder of the right; and (iii) whether the infringing action is constitutionally justifiable.

In its first few decisions,⁵⁸ the South African Constitutional Court has shown an inclination towards the Canadian 'two-stage' approach to an inquiry concerning the constitutional (in)validity of statutes. Assuming that the Canadian 'two-stage' approach would also be followed in a constitutional dispute about property, the structure of an inquiry into section 25 of the Constitution was also formulated in two stages:⁵⁹ the applicants first bear the onus of

52 Michelman in Van Maanen & Van der Walt (note 29 above) 442.

53 E.g. private or administrative law.

54 Michelman in Van Maanen & Van der Walt (note 29 above) 443.

55 At 449.

56 Compare Michelman (note 42 above) 578.

57 See J de Waal, I Currie & G Erasmus *Bill of Rights Handbook* 2nd ed (1999) 20-25.

58 I.e. *S v Makwanyane* 1995 (3) SA 391 (CC), par [100]-[102]; *Ferreira v Levin*; *Vryenhoek v Powell NO* 1996 1 BCLR 1 (CC) 26H.

59 AJ van der Walt *The Constitutional Property Clause* (1997) 28 and AJ van der Walt 'The Limits of Constitutional Property' (1997) 12 *SAPL* 277.

proving that an infringement of a property right, protected by section 25, has taken place. As such, the applicants would have to affirm (i) that the interest under discussion must qualify for protection under section 25, and (ii) that an infringement of this interest has taken place. Once these issues have been established, the state (or the party relying on the validity of the relevant act) has the onus of proving that the infringement is justified, either in terms of section 25 or in terms of section 36 or both.

The Canadian Charter of Rights and Freedoms, the interpretation upon which the 'two-stage' approach was originally based, does not explicitly protect the right to property along with the other categories of protected legal rights.⁶⁰ As such, the application of the two-stage approach specifically as far as property protection and regulation are concerned, might be questionable. Nevertheless, the two-stage approach to human-rights adjudication has become deeply ingrained in the fabric of South African constitutional law over the past decade. Moreover, the constitutional property clause enjoyed relatively little attention at the outset of the new constitutional order (in spite of expectations to the contrary). By the time that constitutional property protection and regulation began enjoying increased prominence, as in the decisions of *Bühmann/Nkosi* and *FNB/SARS*, the two-stage approach was so firmly established that it was adopted without further ado in investigations of constitutional scrutiny for property protection and regulation. Still, the strict separation of the constitutionality inquiry into two stages has some implications for the definition of the scope of constitutional property protection and the justifiability of limitations on private property. The wisdom of applying the two-stage approach in the particular context of property will have to be considered once the role of the constitutional principles of liberty and social responsibility in the scrutiny analysis has been clarified.

(b) Protective ambit of the South African property clause

The most obvious external characteristic of a constitutional property clause is the type of property protection it guarantees. The South African property clause, however, like the constitutional property clauses of many other jurisdictions,⁶¹ does not contain a definition of the concept of ownership in the constitutional context.⁶² Ackerman J, in the Constitutional Court judgment of *FNB/SARS*, states that at this stage of the development of South African constitutional jurisprudence it is practically impossible and judicially unwise to list compre-

60 See RW Bauman 'Property Rights in the Canadian Constitutional Context' 1992 *SAJHR* 344-361 for a description of the circumstances giving rise to the exclusion of a property guarantee from the Canadian Charter of Rights and Freedoms.

61 See e.g. art 14 of the German Basic Law, which is phrased in general terms and could in principle encompass all conceivable forms of property. Papier in Maunz & Dürig (note 47 above) marginal note 63; *BVerfGE* 36, 281, 290; *BVerfGE* 42, 263, 292-293; *BVerfGE* 51, 193, 218; *BVerfGE* 58, 300 (*Nafauskiesung*) 335. The Fifth Amendment to the US Constitution specifically deals with takings by the federal government and provides that private property shall not be taken for public use without just compensation, without defining the concept of property as such. The different states are bound to provide compensation for takings of private property pursuant to the just compensation clause of the Fifth Amendment as made applicable to the states through the due process clause of the Fourteenth Amendment. (See *First English Evangelical Lutheran Church v Los Angeles County* 482 US 304 (1987); JA Borron & CT Diennes *Constitutional Law in a Nutshell* (1999) 181.

62 Although s 25(4) of the Constitution functions as a definition clause within the property guarantee, it does not address all problems of interpretation. It does not contain a *numerus clausus* of proprietary interests that deserve protection, leaving it to the courts and the legislature to define the scope and limits of constitutional property.

hensively the kinds of property relations that would or should be protected constitutionally.⁶³ Michelman⁶⁴ indicates that:

property has become a purely analytical notion with no compelling intuitive content. ... Property has come to signify abstract legal relations on the order of rights, powers, privileges and immunities. Specifically the question of what relations or relational complexes count as property has no well-defined answer.

The task of defining the scope and limits of constitutional property protection is left to the judiciary, and is not simplified by the exact choice of terminology.⁶⁵ Judges are expected to deliver responsible solutions where interests differ, or where common-sense notions of property do not accord with evident constitutional purposes. As such, they are inevitably bound to make political decisions or value judgments,⁶⁶ whatever their purported reasoning seems to be.

Many believe,⁶⁷ for instance, that the protective ambit of a property guarantee depends on the manner in which the specific provision is formulated, in either a positive or a negative vein. Section 25(1) of the Constitution provides that no one may be deprived of property except in terms of law of general application, and that no law may permit arbitrary deprivation of property. Section 25(2) lays down the requirements for a just expropriation of property. The provision in section 25(1) of the Constitution is negatively phrased, within a sentence

63 See the Constitutional Court decision par [54].

64 Michelman (note 42 above) 581.

65 S 28 IC used the term 'rights in property' and s 25 of the Constitution uses the term 'property', neither of which is defined in either of the constitutions. The former term was contentious right from the outset. According to LM du Plessis & H Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 56, the phrase in the Interim Constitution was used to appease the concerns of traditional leaders that the Western notion of individual ownership does not cater for communal ownership. See, however, the various interpretations of M Chaskalson 'The Property Clause: Section 28 of the Constitution' 1994 *SAJHR* 131-139; M Chaskalson & C Lewis 'Property' in M Chaskalson et al (eds) *Constitutional Law of South Africa* (1996) ch 31, 5; AJ van der Walt 'Notes on the Interpretation of the Property Clause in the New Constitution' 1994 *THRHR* 181-203; J Murphy 'Interpreting the Property Clause in the Constitution Act of 1993' 1995 *SAPL* 107-130; D Davis, H Cheadle & N Haysom *Fundamental Rights in the Constitution – Commentary and Cases* (1997) 239-242; I Kroeze 'The Impact of the Bill of Rights on Property Law' 1994 *SAPL* 326. In view of the dispute about the meaning of the term 'rights in property', s 25 of the Constitution refers only to 'property'. By this time, however, most South African lawyers realised that the exact terminology was probably less important than the overall structure and function of the property clause in the Bill of Rights as a whole: AJ van der Walt *Constitutional Property Clauses – A Comparative Analysis* (1999) 351. Therefore, the change in terminology might have evaded some of the dogmatic problems, but did not simplify the 'threshold' question in the South African context. The courts are still faced with the problem of how far they should extend the guarantee of rights in property to non-real rights in incorporeals.

66 Michelman 'Property as a Constitutional Right' (note 2 above) 1112; Michelman (note 42 above) 583.

67 Cf with regard to the constitutional property protection in the US, JH Ely *Democracy and Distrust* (1980) 14-21; and also the summary of the US Supreme Court's stance in takings cases such as *Perry v Sindermann* 408 US 593, 599-603 (1972) and *Board of Regents v Roth* 408 US 564, 576-78 (1972) in Michelman (note 42 above) 583. Michelman explains his views somewhat later in the same essay (586) as follows: '[T]he constitutional right of property is strictly parasitic on non-constitutional positive law. Such a parasitic constitutional right would make no demands on the content of the standing general laws, such as, that those laws must establish, as to some range of valued objects or opportunities, a regime of legal relations intuitively recognizable as private property. Rather, the parasitic conception would allow that those laws may, as of any given moment, provide or not provide for any form of private entitlement respecting any class of objects. The right would attach to whatever such entitlements the standing general law does happen to establish. It would protect those and only those commitments against certain kinds and modes of governmental impairment.' However, Michelman expresses doubt (587) as to whether a 'strictly parasitic' conception of constitutionally protected property, 'offering no protection against legal redefinition of property rights to the point of extinction,' could be acceptable to the public and the judiciary.

prohibiting deprivations. It includes conditions for limitations on property.⁶⁸ At first glance, therefore, section 25 of the South African Constitution seems not to provide individuals with positive⁶⁹ claims against the state for the provision of property. Furthermore, the wording of section 25 raises doubts whether both individual property (i. e. property in the ‘holding’ sense) as well as the institution of property (i.e. property as a ‘regime’) is protected.

Hence, the negative formulation of the property clause could give rise to the argument that section 25 of the Constitution in reality protects something ‘less than property,’⁷⁰ namely the right not to be deprived of property and the right not to be expropriated except as provided for in the property clause itself. As such, property would be regarded as a ‘process right’ – an ‘ingredient in the constitution of the individual as a participant in the life of the society, including not least the society’s processes for regulating the conditions of an ineluctably social existence.’⁷¹ The Constitutional Court indicated, however, a preference for an interpretation of section 25(1) upholding the idea of an individual property guarantee, even if this terminology is not used explicitly. According to the *First Certification Case*,⁷² a negative formulation such as employed in section 25 of the Constitution appears to be widely accepted as an appropriate formulation of the right to property,⁷³ and property can be appropriately protected even in the absence of a clause expressly guaranteeing the existence of the right to property.⁷⁴ Upon this basis, it must be accepted that the full content of property – and not something ‘less than property’ – is protected by section 25(1).⁷⁵ In particular, the Court remarked that the right to hold property is implicit in section 25(1). Therefore the Court could not support the argument that section 25 failed to meet the requirements of Constitutional Principle II in Schedule 4 of the Interim Constitution simply because of its negative formulation and its lack of express recognition of the right to acquire and dispose of property. Hence, it is inevitable to deduce that the South African judiciary supports the protection of property ‘holdings’ in the sense of individuals’ rights to acquire, hold and dispose of property in particular circumstances.⁷⁶

The negative formulation of the property guarantee in section 25(1) makes it more difficult to assume that the institution of property (i.e. the ‘regime’) is guaranteed. Nevertheless, the tendency of the courts to follow a purposive interpretation of the constitutional provisions

68 Hence, s 25(1) could be seen as a clause directly restricting the scope of the right that is protected, i.e. a specific negative guarantee, rather than a general negative guarantee. After explaining (297) that the difference between specific and general negative guarantees lies in the fact that in the former case, both the guarantee as well as the limitations provision are phrased negatively within one sentence, whereas the latter would be characterised by two phrases, AJ van der Walt ‘Limits of Constitutional Property’ (note 59 above) 301-302 points out that this difference is probably merely a question of linguistic preference by the drafters of the Constitution, instead of a conscious attempt to protection of something less than property.

69 Or rather, direct claims to property, in the terminology of Michelman ‘Property as a Constitutional Right’ (note 2 above) 1099-1101.

70 See the explanation of this argument in AJ van der Walt ‘Limits of Constitutional Property’ (note 59 above) 295-313.

71 Michelman (note 42 above) 588; Michelman (note 1 above) 304.

72 *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) par [72].

73 The South African Constitutional Court acknowledged that neither the positive nor the negative formulation of the constitutional property clause can be described as being the universally acceptable version: *Certification Case* note 72 above par [72]. Positive property guarantees are found in the constitutions of several jurisdictions, although most property clauses comprise at least a negative guarantee of property, which authorises the limitation of property rights subject to certain explicit requirements. Van der Walt (note 65 above) 11.

74 *Certification Case* note 72 above par [72].

75 See also the endorsement of this dictum by Ackerman J in the Constitutional Court decision of *FNB/SARS* note 9 above par [50].

76 See the reasoning of Ackerman J in the Constitutional Court’s *FNB/SARS* decision note 9 above par [58].

renders a narrow distinction between negative and positive formulations of rights in one and the same provision illogical. Moreover, comparison with other jurisdictions indicates that a positive or negative formulation – or, for that matter even a general or specific negative formulation – of the guarantee to property, does not cause a significant difference in the protection afforded to property in the various legal systems.⁷⁷ Van der Walt⁷⁸ is of the opinion, however, that the positive element of the property clause in section 28(1) of the Interim Constitution was omitted from the final property clause specifically to avoid the debate about the existence of an institutional guarantee. However, Kleyn⁷⁹ convincingly argues that an institutional guarantee can still be based on section 25 of the Constitution,⁸⁰ because the commitment to land reform, access to resources, restitution of land and the security of tenure all point to the creation of a mixed economy in which the newly empowered ‘deprived’ section of the South African society can benefit from an institutional guarantee. He points out that these issues reflect the duty upon the state to safeguard the institution of property. Accordingly, it would be senseless to protect property in a bill of rights if the institution of property as a fundamental right in the objective sense is not protected. Even if this argument is left aside, one could accept that the idea of constitutional protection for the ‘regime’ of property could be inferred from the decision in the *First Certification Case*.⁸¹ The indifference of the Constitutional Court towards the type of formulation (positive or negative) points to an implicit adoption of the institutional guarantee of property. In later judgments, like those emanating from the *Nkosi/Bührmann* and *FNB/SARS* disputes, this notion is apparently accepted.

The *Nkosi/Bührmann* cases involved an application of the property clause in a dispute between private individuals only, because it related to competing individual rights and interests, such as freedom of religion, and a variety of property interests of the different stakeholders.⁸²

The *FNB/SARS* dispute related to the property rights of third parties against the state in the context of the enforcement of tax debt. Hence, it involved an application of the property clause where one of the parties happened to be a state organ (the Receiver of Revenue).

One would expect, therefore, that different issues would be at stake in the different sets of cases as far as the protective ambit of the constitutional property clause is concerned. Interestingly though, the protective scope of section 25 did not receive as much attention as did the later stages of constitutional scrutiny. Where the protective scope did receive attention in the *Nkosi/Bührmann* cases, the courts’ reasoning drew strongly on the private-law conception of ownership and real rights.⁸³ Both the provincial division’s full bench and the Supreme Court of Appeal implicitly accepted that both landownership and tenure rights of occupants might qualify as constitutionally protected property.⁸⁴ Du Plessis J and Satchwell J, in the provincial

77 Van der Walt ‘Limits of Constitutional Property’ (note 59 above) 299-301.

78 Van der Walt ‘Limits of Constitutional Property’ (note 59 above) 303.

79 D Kleyn ‘The Constitutional Protection of Property: A Comparison Between the German and South African Approach’ 1996 *SAPL* 418.

80 See, however, Van der Walt ‘Limits of Constitutional Property’ (note 59 above) 303 note 45.

81 *Certification Case* note 72 above par [70]-[75].

82 The ownership of the landowner, on the one hand, and the tenure rights of the occupants, on the other. The provincial, full-bench decision equated the tenure rights in this instance with rights of residence, and rights of use incidental to the residence itself. See *Nkosi/Bührmann* provincial full-bench decision note 8 above 1151 C-F.

83 Ackerman J’s ruling in the Constitutional Court’s decision of *FNB/SARS* note 9 above, and to some extent Ngoepe J’s dissenting judgment in the full-bench decision of *Nkosi/Bührmann* note 8 above were the only exceptions, as will be indicated below.

84 E.g. *Nkosi/Bührmann* provincial full-bench decision 1151C-F.

full-bench decision, and Howie JA, in the Supreme Court of Appeal, seemed to accept, however, the common-law definition of ownership as the norm⁸⁵ in an inquiry as to whether affording burial rights to the occupants would pass constitutional scrutiny. They reasoned that the occupants' rights are 'circumscribed by and to be balanced against'⁸⁶ the rights of the landowner. They eventually concluded that tenure (in the sense of a right of residence and use incidental thereto) has a temporary quality and can therefore not weigh up against landownership, except as far as the requirements for proper eviction in the ESTA are concerned.⁸⁷

In the *FNB/SARS* dispute the protective ambit of the constitutional property clause was defined (albeit implicitly)⁸⁸ by the court *a quo* with regard to the situation in private law concerning the two so-called⁸⁹ private-law 'cousins' of the statutory lien, namely the common-law lien and the landlord's hypothec. The court indicated that both could operate in a way defeating the rights of an owner whose property was subject to a lien.⁹⁰ The Constitutional Court indicated, however, that the provisions of section 114 of the Customs and Excise Act create a statutory lien so expansive that an analogy with any common-law lien cannot be justified. In particular, Ackerman J remarks that section 114 of the Customs and Excise Act does not establish a significant nexus between the creditor/Commissioner and the non-debtor third party over whose property the lien is created.

Ackerman J, in the latter case, gives us some insight into the kind of value judgments that might underlie an inquiry into the protective ambit of the constitutional property clause. He refers⁹¹ to the historical and contextual interpretation of the property clause and then specifically links it with the 'need for and aim at redressing one of the most enduring legacies of racial discrimination ... namely the grossly unequal distribution of land in South Africa'. Admitting that the provisions of sections 25(4) to 25(9) of the Constitution have no direct relevance to the *FNB/SARS* dispute, the judge nevertheless finds it necessary to bear these provisions in mind, 'because they emphasise that under the 1996 Constitution the protection of property as an individual right is not absolute but subject to societal considerations'. He furthermore stresses that the preamble to the Constitution indicates, as one of its purposes, the establishment of a society based on democratic values, fundamental human rights, and also social justice.

One would expect this kind of reasoning more readily in cases dealing with the rectification of past injustices of the land regime. Ngoepe J, dissenting in the *Nkosi/Bührmann* full-bench decision, implicitly follows a similar direction when seriously considering the content of free-

85 E.g. *Nkosi/Bührmann* provincial full-bench decision 1156B-E.

86 *Nkosi/Bührmann* provincial full-bench decision note 8 above 1156 F-H.

87 *Nkosi/Bührmann* SCA decision note 8 above 388B-C.

88 Conradie J in the *a quo* decision note 9 above did not find it necessary to decide whether that which was taken from FNB in terms of section 114 of the Customs and Excise Act amounted to 'property' for purposes of the constitutional provisions, but assumed that it did.

89 See *FNB/SARS a quo* judgment note 9 above 327B-C.

90 *FNB/SARS a quo* judgment note 9 above 327C.

91 *FNB/SARS* note 9 above par [52].

dom of religion for Mrs Nkosi in particular,⁹² before proceeding with a consideration of the inroads made by these religious rights on the rights of the landowner.⁹³

As far as attaching particular importance to the constitutional principle of social justice in the context of a property protection which bears no relation to land reform is concerned, Ackerman J in the *FNB/SARS* Constitutional Court decision explains his stance. He refers to the inherent tension between individual rights and social responsibilities in the property clause⁹⁴ before deciding that the purpose of section 25 is to protect existing private property rights and the public interest, and to strike a proportionate balance between these aspects. He then clearly indicates that this purpose is not limited to land reform issues,⁹⁵ and his view about the importance of democratic values and social justice is applied to the situation of innocent third parties being held liable indirectly for the tax debt of others.

The most striking recognitions, therefore, as far as the protective ambit of the property clause is concerned, can be found in the dissenting judgment of Ngoepe J in the provincial full-bench decision of *Nkosi/Bührmann* and in the Constitutional Court's judgment in *FNB/SARS*. The manner in which the constitutional principles are applied in the first stage of the inquiry (i.e. in the determination of the protective ambit of the constitutional property clause) inevitably leads to a type of balancing act between differing, clashing interests. This is, many authors would argue, something that should be left to the second stage of the constitutional inquiry, namely the limitation analysis.

(c) *Limitation analysis*

Section 7(3) of the Constitution lays down the general rule that all the rights in the Bill of Rights are limited in principle, being subject to section 36, which stipulates the constitutional authority for limiting fundamental rights, and provides the controlling requirements for such a limitation.⁹⁶ Section 36(1) of the Constitution simultaneously circumscribes the legislature's capacity to limit fundamental rights,⁹⁷ and provides some guidelines for interpreting this provision.⁹⁸ Thus, two aspects of the principle of proportionality are combined within section 36(1), through the involvement of both the legislature and the courts.⁹⁹ Furthermore,

92 *Nkosi/Bührmann* provincial full-bench decision note 8 above. The judge painstakingly analyses the evidence provided by Mrs Nkosi (1158C-1159G) and the content of the right to freedom of religion in public international law (1159H-1160F) before finding that 'there is a strong relationship between people's religion and the way in which, in the manifestation of such a belief, they would want their dead to be buried.' (1161C.) On this basis, then, the rights of the landowner and the sacrifices expected from him, are considered.

93 *Nkosi/Bührmann* provincial full-bench decision note 8 above 1161E-G.

94 See also Van der Walt (note 59 above) 15-16, which is quoted in the decision.

95 *FNB/SARS* note 9 above par [53].

96 Van der Walt 'Limits of Constitutional Property' (note 59 above) 284.

97 The first part of the limitation clause, for instance, provides the constitutional reference for limitation by the legislature, providing that rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

98 The second part of s 36(1) of the Constitution provides for a consideration of all relevant factors when limiting a fundamental right, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose. In this way, focus is placed on the interpretation of constitutional norms in a given case.

99 L Blaauw-Wolf 'The "Balancing of Interests" with Reference to the Principle of Proportionality and the Doctrine of *Güterabwägung* – A Comparative Analysis' 1999 *SAPL* 178, 210-211.

section 36(1) confirms that the protection of fundamental rights is in principle restricted, in spite of the guarantee contained in each fundamental right provision. This applies to all rights, including property. These two aspects of the limitation analysis in the context of property law (i.e. the restricted scope of property protection, and the application of the proportionality principle) deserve closer attention.

(i) Constitutional limits of property

Some authors¹⁰⁰ believe that section 36 of the Constitution can have no meaningful application to section 25.¹⁰¹ Their views in this regard are linked to the idea that something 'less than property' is protected by section 25. The gist of their argument is that the criteria justifying the limitation of rights are included in the demarcation of the rights in section 25, thus making the basis for justifying the infringement of section 25 of the Constitution the very reason why section 25 was infringed in the first place. If the object of the right protected by section 25 were limited to something 'less than property,' section 36 would indeed become obsolete because of the built-in limitations in section 25. This obviously must be illogical. For one, section 7(3) of the Constitution excludes the possibility that the limitation provisions of section 36 could simply not be applicable to section 25. In fact, section 7(3) of the Constitution supports a reading of the Bill of Rights in which sections 25 and 36 are applied cumulatively. It provides for the limitation of the rights in the Bill of Rights by section 36. No express exclusion of section 25 from the effect of section 7(3) is provided. The starting point of the investigation as to constitutional justifiability of infringements on property therefore cannot be the question as to the protection of something 'less than property'. It is rather the protection of the eligibility to hold an interest with economic value that deserves such protection because it has the purpose of assisting an individual to live a self-fulfilled life and to make responsible choices regarding his or her patrimonial interests.

Another consideration is the presence of specific limitations and internal modifying components in the property clause. Broadly speaking, a specific limitation provides the legislature with special grounds to limit the relevant right,¹⁰² and is aimed at expressing one or more of the elements usually contained in limitation clauses in more specific terms with regard to a particular fundamental right.¹⁰³ Internal modifying components are aimed at providing greater clarity in respect of some of the vague and indeterminate words used in describing the

100 J de Waal, I Currie & G Erasmus *Bill of Rights Handbook* 3rd ed (2002) 393-394.

101 This is indeed the inevitable conclusion that will be reached if a process is followed by which the provisions of s 25 of the Constitution themselves are first exhausted before turning to an examination of the influence of s 36 on a specific matter. De Waal, Currie & Erasmus (note 100 above) 394 explain: 'It seems that s 36 can have no meaningful application to s 25. The rights in s 25 have been qualified to such an extent that it is unlikely that any violation of those rights can be justified. Put another way, if an applicant is able to discharge the difficult burden of showing that the rights in s 25(1)-(3) have been violated, the state will be unable to justify the violation in terms of s 36.'

102 IM Rautenbach *General Provisions of the South African Bill of Rights* (1995) 105-106; J de Waal 'A Comparative Analysis of the Provisions of German Origin in the Interim Bill of Rights' 1995 *SAJHR* 25; Van der Walt 'Limits of Constitutional Property' (note 59 above) 281. The language is usually couched in negative terms and directed at the state. The provisions cannot therefore be considered as mere demarcations. The guarantees of equality (s 9(3) of the Constitution), freedom of religion, belief and opinion (s 15(2) of the Constitution), and expression (s 16(2) of the Constitution) are a few examples of the kind of clauses containing special limitations.

103 Rautenbach (note 102 above) 106. In addition, the state bears the onus of showing that it exploited a specific limitation, whereas the complainant bears the onus of showing that his or her activity fell within the scope of a demarcated right. De Waal (note 102 above) 25.

protected conduct and interests.¹⁰⁴ These demarcations would then typically be important in the first phase of the constitutionality inquiry, where the scope of the guarantee is examined.¹⁰⁵ Specific limitation provisions, on the other hand, would be more important when the justifiability of an infringement has to be determined in the second phase of the inquiry.¹⁰⁶ With reference to section 25 of the 1996 Constitution specifically, internal modifying components will help define the content of property. By contrast, specific limitations will help determine the justifiability of limitations on constitutionally protected property rights.¹⁰⁷

There are many divergent views on not only the classification of the different 'limiting elements' in section 25, but also on whether and how section 25 should interact with section 36. Van der Walt has already provided an exposition of these approaches,¹⁰⁸ making it unnecessary to repeat them here, given the limited scope of this contribution. Briefly, though, exponents of the view that section 25 of the Constitution guarantees something 'less than property' hold the opinion that section 25 contains no specific limitations, and that all 'limiting elements' in section 25 should be regarded as internal limiting components.¹⁰⁹ Upon this basis, it is then argued that the application of the general limitation clause can have no meaningful application to the property clause.¹¹⁰ This approach cannot be tenable. As was indicated above,¹¹¹ section 7(3) of the 1996 Constitution excludes the possibility that the general limitation provision could simply not apply to the property clause in the Bill of Rights, and instead supports the idea that sections 25 and 36 should be applied cumulatively. This suggests that the starting point of an investigation as to constitutional justifiability of infringements on property must be the eligibility to hold an interest with economic value that deserves constitutional protection because it has the purpose of assisting an individual to live a self-fulfilled

104 The following provisions in the Final Constitution are examples of internal modifying components: s 14 of the Constitution (Privacy): 'Everyone has the right to privacy, which includes the right not to have (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed.' s 32 of the Constitution (Access to information): '(1) Everyone has the right of access to – (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights.' (Emphasis added.)

105 S Woolman 'Out of Order? Out of Balance? The Limitation Clause of the Final Constitution' 1997 *SAJHR* 102 108 indicates the difficulties that arise if internal modifying components are to be treated as part of the inquiry concerning justifiability: 'The limitation stage [i.e. the inquiry into the justifiability of an infringement upon a fundamental right] directs our attention primarily, if not exclusively, to the reasonableness and justifiability of a limitation in an open and democratic society based upon human dignity, freedom and equality. Consideration of the nature and scope of the right is something that should already have taken place. To engage the question of a right's nature a second time would seem to invite analytical confusion.'

106 Therefore, the language used in specific limitation clauses often reminds of the general limitation clause, whereas an internal modifying component usually, linguistically, takes the form of an adjectival or adverbial phrase. De Waal (note 102 above) 25-26.

107 Van der Walt 'Limits of Constitutional Property' (note 59 above) 281-282.

108 Van der Walt 'Limits of Constitutional Property' (note 59 above) 275-330.

109 Van der Walt 'Limits of Constitutional Property' (note 59 above) 293; De Waal, Currie & Erasmus (note 100 above) 393.

110 This is indeed the inevitable conclusion that will be reached if a process is followed by which the provisions of s 25 themselves are first exhausted before turning to an examination of the influence of s 36 on a specific matter. De Waal, Currie & Erasmus (note 100 above) 394 explain: 'It seems that s 36 can have no meaningful application to s 25. The rights in s 25 have been qualified to such an extent that it is unlikely that any violation of those rights can be justified. Put another way, if an applicant is able to discharge the difficult burden of showing that the rights in s 25(1)-(3) have been violated, the state will be unable to justify the violation in terms of s 36.'

111 See the discussion of s 7(3) at p 18 above.

life and to make responsible choices regarding his or her patrimonial interests,¹¹² even though the property clause is phrased negatively.

The provisions of section 25(1) and (2) of the Constitution, namely that deprivation and expropriation of property may occur only in terms of law of general application; that deprivations may not be arbitrary; and that expropriations must be for a public purpose or in the public interest and subject to compensation, must amount to specific limitations, rather than internal modifying components. They determine the requirements for a limitation of property, rather than define the right that is to be protected. By contrast, the provision in section 25(5), that the state must take reasonable legislative and other measures, within its available resources, to foster conditions that will enable citizens to gain access to land on an equitable basis, may be seen as an internal modifier.¹¹³ Furthermore, the provisions of section 25(3)(a), (b), (c) and (d)¹¹⁴ necessitate an inquiry into the permissible actions or entitlements of the property holder, and can therefore be regarded as internal modifying components describing the outer scope of the protected right.¹¹⁵ In view of the fact that the primary function of a specific limitation clause is to determine the effect of section 36(1) on a specific case, it cannot hold true that the existence of specific limitations and internal modifying components excludes the application of the general limitation clause.¹¹⁶ Instead, they serve to simplify the inquiry. The presence of specific limitations and internal modifying components in certain guarantees simply shows that the words of the general limitation clause could have a variety of meanings within the different contexts of separate rights and freedoms.¹¹⁷

The existence of specific limitations within section 25 of the 1996 Constitution therefore does not justify a deviation with regard to the applicability of section 36 to the property

112 There are many examples in, for instance, German law relating to art 14 GG where such an approach was successfully followed. For more details, see H Mostert *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany – A Comparative Analysis* (2002).

113 See mention made by the Panel of Constitutional Experts' Memorandum (*Re: Panel Memo on 'Special Limitations'/'Qualifiers' and General Limitation*) of 20-02-1996, available online at <http://www.constitution.org.za/exmemo/cp320026.html> [19.01.2000], where this provision is described as being a 'special limitation or internal qualifier'. From the definition provided in this document for the term(s), it becomes apparent that focus is placed only on the so-called internal modifying components.

114 S 25(3): 'The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including – (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.'

115 Van der Walt 'Limits of Constitutional Property' (note 59 above) 312 explains: 'while the market value of the property is taken into account when determining compensation, certain current uses of the property, certain practices relating to the history of the acquisition and use of the property and certain state investments and subsidies which enhanced the value of the property are excluded from the protection against expropriation and will not be included in just and equitable compensation. These provisions exclude certain aspects or possible entitlements from the protection of section 25(2) and 25(3) of the Constitution generally and ab initio, and can therefore be described as internal modifiers.'

116 This also applies to the modified argument of Ackerman J in the Constitutional Court decision of *FNB/SARS* note 9 above par [73] where he indicates that '[i]f the deprivation is not arbitrary, the section 25(1) right is not limited and the question of justification under section 36 does not arise'. This comment is made to counteract the view of Van der Walt (note 65 above) 105.

117 Contra Blaauw-Wolf (note 99 above) 210. However, Rautenbach (note 102 above) 107 correctly points out that the presence of a specific limitation clause could, as a result of careless drafting or of complicated compromises struck during the negotiations, in some instances simply repeat elements of the general limitation clause without adding or qualifying anything. In such a case the specific limitation would, naturally, have no influence on the application of the general limitations clause to a specific fundamental right.

clause.¹¹⁸ In fact, the specific limitations within section 25 point to the existence of a functional relationship between section 25 and section 36,¹¹⁹ although opinions might differ on what exactly this relationship entails.¹²⁰ For present purposes, I assume that section 36 provides the structural and value-based framework within which the specific terms of section 25 should be interpreted. The specific limitation provisions in section 25 are aimed at repeating or explaining or providing more detail about the elements contained in section 36.¹²¹ This view would explain the repetition of certain requirements, and place section 25 in line with the provisions of section 7(3). Specific limitations and internal modifiers within section 25 thus render certain provisions of section 36 more specifically applicable to the property clause, and state additional requirements only applicable to situations where section 25 has to be invoked.¹²² The starting point in determining the relation between the property clause and the general limitation clause is section 36 itself.¹²³ This would mean that the provisions of section 36 would, for instance, be employed to determine whether an interference with property is arbitrary or not. As such, section 36 read with section 25 would determine the constitutional limits of property. In view, however, of the inclination towards contextual interpretation of the separate provisions of the Bill of Rights in the light of the Constitution as a whole, section 36 must not only be applicable to section 25, but it must be applicable cumulatively, rather than disjunctively.

118 Rautenbach (note 102 above) 106-107.

119 A general limitation clause might contain elements describing (i) the organ of state empowered to impose a restriction, (ii) the procedures to be followed to impose a limitation, (iii) the purpose for which the limitation may be imposed, and the relationship between the purpose and the limitation, and (iv) the conditions and circumstances under which a limitation may be imposed: Rautenbach (note 102 above) 84-85. A specific limitation provision can either exclude, amend, explain, repeat or provide detail about these elements of the general limitation clause. Depending on the specific function of the specific limitation provision, the provisions of the general limitation can be superseded by it or not. In the case of s 25, no indications exist that the specific limitation provisions are aimed at excluding some or all of the elements of the general limitation provision.

120 Some argue that s 36 will only apply to s 25 in exceptional cases, in view thereof that the provisions of s 25 should be exhausted before the analyses turn to s 36. (Cf Ackerman J in the Constitutional Court's decision in *FNB/SARS* note 9 above par [73].) This would mean that, if the state cannot justify the limitation on the basis of the specific limitation provisions in s 25, a third phase is introduced, in which the state (or the party relying on the validity of the limitation) gets another chance to justify the limitation in terms of the more general provisions of s 36: S Woolman in M Chaskalson et al (eds) *Constitutional Law of South Africa* (1996) ch 12, 14. This approach is inconsistent and impractical in that it requires the courts to override non-compliance with the specific limitation provisions of s 25 if compliance with the more general provisions of s 36 can be indicated. See Van der Walt 'Limits of Constitutional Property' (note 59 above) 292. Another argument emanates from the view that s 25 guarantees something 'less than property,' and entails that the 'limiting elements' in s 25 are all regarded as internal modifying components, restricting the right protected by s 25. This view requires that deprivation or expropriation in defiance of the s 25 provisions be established, before there can be any question as to the limitation of the right. This approach implies that the general application of s 36 to the property clause to certain special cases, in the sense that in terms of this thesis s 36 will not find application to the property clause as long as a restrictive law or state action that affects property rights complies with the more or less formal provisions of s 25. Van der Walt 'Limits of Constitutional Property' (note 59 above) 312-313. This leaves practically no scope for the consideration and balancing of the interests of the individual and society, and effectively ousts the proportionality test, which is incorporated in s 36, from the process.

121 See the analysis of Van der Walt 'Limits of Constitutional Property' (note 59 above) 288 ff.

122 Van der Walt 'Limits of Constitutional Property' (note 59 above) 327.

123 Van der Walt 'Limits of Constitutional Property' (note 59 above) 327-329, contra Ackerman J in the Constitutional Court decision of *FNB/SARS* (note 9 above) par [63].

(ii) Proportionality, interest-balancing and non-arbitrariness

As far as constitutional property protection and regulation are concerned, the function of the proportionality principle in the South African context is closely related to the issue of how sections 25 and 36 of the 1996 Constitution interact. From a conjunctive reading of these sections, the more formal requirements of a justifiable limitation on property can be summarised as follows: to be constitutional, a deprivation or an expropriation of property (that is, a limitation on the right to property) has to be effected in terms of a law,¹²⁴ which must be of general application.¹²⁵ Moreover, such a law may not permit arbitrary limitation¹²⁶ of the right to property.¹²⁷ Furthermore, an expropriation in particular must be for a public purpose or in the public interest.¹²⁸ In addition it is subject to the payment of compensation,¹²⁹ the amount of which should be either agreed to by the affected parties, or determined by a court, in which case it has to be just and equitable.¹³⁰ In any event, all limitations of the right to property need to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom upon the consideration of a number of factors specifically listed in the general limitation clause.¹³¹ A consideration of the nature of the right infringed will determine the level of scrutiny to which a specific limitation is subjected. The importance of the purpose of the limitation will determine whether it serves the values of openness, democracy, human dignity, freedom, equality and all the other values underlying the Bill of Rights and the Constitution as a whole. A consideration of the relation between the limitation and its purpose gives effect to the inquiry about the means employed and their rational relation to the achievement of the particular objective. Only then can one consider whether there are less restrictive means to achieve the purpose. Finally, an inquiry into the nature and extent of the limitation becomes important after all the other factors have been considered. This factor calls for a 'genuine' balancing of the values at stake; a consideration of the compromise of social interests reached by the government. This exercise necessarily places a court under immense political pressure, because it requires taking a policy decision.

The considerations set out above necessitate a brief discussion of the difference between proportionality review and 'interest-balancing' in the process of determining whether limitations on property in specific circumstances pass constitutional scrutiny. The function of

124 S 25(1) and (2); s 36(1).

125 S 25(1) and (2); s 36(1). Blaauw-Wolf (note 99 above) 178 ff indicates that 'generally applicable law' can only include statutes made by the legislature and not administrative regulations or decrees. The reason for this provision is that the democratically elected legislature must authorise the limitation, being the organ of state endowed with legislative powers. However, the legislature must still remain within the ambit of what has been authorised by the Constitution: it may only restrict a fundamental right to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This implies that a fundamental right must be left intact insofar as these requirements are not met. Moreover, the limitation must apply generally and not solely to an individual case.

126 S 25(1). Expropriation is regarded as a special subcategory of deprivation. This means that expropriatory actions would also be subject to the requirement of non-arbitrariness.

127 S 25(1).

128 S 25(2)(a).

129 S 25(2)(b). Van der Walt (note 59 above) 115.

130 Contrary to the situation in most other legal systems, the South African property clause also provides some indications of how the justness and equability of the compensation amount should be determined. See s 25(3).

131 S 36(1)(a)-(e). These factors are: (i) the nature of the specific right; (ii) the importance of the purpose of the limitation; (iii) the nature and extent of the limitation; (iv) the relation between the limitation and its purpose; and (v) the availability of less restrictive means to achieve the purpose. See the plea of Woolman (note 105 above) 110-111 for the rearrangement of the factors in s 36(1)(a)-(e) in order to facilitate a proper limitation analysis.

the proportionality test is to render possible an examination of the purpose of a specific limitation to determine whether it is proportionate to its consequences. The South African proportionality test, as formulated in the *Makwanyane* case and codified in section 36(1), was to some extent based on the German and Canadian approaches towards the determination of the proportionality of interferences with fundamental rights, but goes further in some regards.¹³² To use the vocabulary of German¹³³ and Canadian¹³⁴ jurisprudence,¹³⁵ proportionality review consists of three elements:¹³⁶

- a. the limitation must be necessary (*erforderlich*) to promote the public purpose served by it (i.e. there must be a 'rational connection' between the limitation and its purpose);
- b. the limitation must be suitable (*geeignet*) to promote or serve that purpose (which requires a 'means-ends' analysis); and
- c. the limitation must be moderate (*zumutbar/angemessen*) – or rather, it must not be disproportionate – in its effects.

Three conditions for a valid limitation are set out by section 36(1). First, the restriction must be in terms of law of general application.¹³⁷ This criterion represents a formal requirement that must be met before the inquiry can proceed to the proportionality test. Second, a specific limitation must be reasonable. 'Reasonableness' requires that a limitation may not be arbitrary, unfair or based on irrational considerations, and therefore it constitutes a 'rational connection' test. Third, the limitation must be justifiable in an open and democratic society. The 'justifiability' requirement is comparable to the 'means-ends' inquiry of whether a limitation is

132 Blaauw-Wolf (note 99 above) 178 ff.

133 In Germany, the proportionality of specific limitations is tested by considering the objective suitability (*Geeignetheit*) of the law, action or measure; its necessity (*Erforderlichkeit*); and its reasonableness or 'proportionality' in the narrow sense (*Angemessenheit*). Objective suitability means that the restriction, which is being tested against the constitutional provisions, should be appropriate or suitable to achieve the objective intended. The intended aim of the legislation under discussion must be measured against the possible means to achieve it, to determine whether a rational relationship exist between them. Necessity implies that the measure taken must not be harsher than is necessary to achieve the specified goal. Reasonableness (or 'proportionality' in the narrow sense) means that, in relation to the importance and meaning of the fundamental right, no less far-reaching restriction would have achieved the same result. C Degenhart *Staatsrecht I* (1998), marginal notes 278, 279, 281; G Robbers *Introduction to German Law* (1998), 61; L Blaau, [sic] 'The *Rechtsstaat* Idea Compared with the Rule of Law as a Paradigm for Protecting Rights' 1990 *SALJ* 82.

134 In *R v Oakes* 1986 (19) CRR 308; 1986 (1) SCR 103; 1986 (26) DLR 4th 200 SCC; 1987 LRC (Const) 477 it was held that, in order to be valid in terms of the general limitation clause (s 1 of the Canadian Charter of Rights and Freedoms, 1982), a limitation had to satisfy two requirements. (i) The limitation has to be aimed at an objective that is important enough to justify the limitation of the right. (ii) It has to be justified in terms of a proportionality test, which consists of three elements, i.e. the limitation has to be rationally connected to the objective and designed to achieve that objective; that the means chosen to achieve the objective should impair the right as little as possible; and there must be proportionality between the effect of the measures and the objective they are aimed at achieving.

135 There are strong indications that the test as formulated in *Makwanyane* note 58 above and 'codified' in s 36(1) is based on German and Canadian jurisprudence, even though Chaskalson P expressed reservations concerning the use of foreign jurisprudence in this regard (see par [104] note 130).

136 See the summary of Van der Walt 'Limits of Constitutional Property' (note 59 above) 319.

137 'Generally applicable law' can only be statutes made by the legislature and not administrative regulations or decrees. The reason for this provision is that the democratically elected legislature must authorise the limitation, being the organ of state endowed with legislative powers. However, the legislature must still remain within the ambit of what has been authorised by the Constitution: it may only restrict a fundamental right to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This implies that a fundamental right must be left intact insofar as these requirements are not met. Moreover, the limitation must apply generally and not solely to an individual case.

suitable or appropriate to achieve a specific objective. These criteria constitute the elements of the principle of proportionality. The specific requirements in section 36(1)(a) to (e) act as aids in determining the strict proportionality of a specific infringement. Although such an examination inevitably entails a measure of ‘interest-balancing’ in the very broad sense of the word,¹³⁸ interest-balancing should not be regarded as always being synonymous with proportionality review.

Blaauw-Wolff shows that, depending on the circumstances, ‘interest-balancing’ has different meanings, rendering it possibly misleading.¹³⁹ It is possible to attach at least four interpretations to this term.

- a. ‘Interest-balancing’ might be regarded as the weighing up of competing basic constitutional values. It implies that one interest or right takes precedence over another and that the preference afforded that particular interest or right renders the other one as subordinate to the one taking priority.¹⁴⁰ This approach threatens the inner cohesion of the Constitution’s founding principles,¹⁴¹ and does not promote equal respect for all the fundamental rights.
- b. ‘Interest-balancing’ might refer to the approach of attaining a harmonious concretisation or practical concordance of competing provisions.¹⁴² This kind of ‘optimisation’ of the relevant interests or rights is often regarded as a function of the idea that the various constitutional principles function in unity.¹⁴³

138 Cf e.g. Chaskalson P in *S v Makwanyane* note 58 above par [104]: ‘Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests.’ Blaauw-Wolff (note 99 above) 209 explains that the emphasis of the Court in this instance ‘... is no longer on the “weighing of values” in the sense of the doctrine of *Güterabwägung*. Instead, the terminology of “balancing of interests” is invoked in the context of the principle of proportionality. In this “balancing process” the age-old likeness of *Justitia* and her scales which balances [sic] in favour of justice is used.’ Cf also the dictum of Ackermann J in *De Lange v Smuts* 1998 (3) SA 785 (CC) (1998 (7) BCLR 779) par [86]-[88] where an exposition of the application of s 36(1) is provided: ‘The balancing of different interests must still take place. On the one hand there is the right infringed, its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose.’

139 Blaauw-Wolff (note 99 above) 178.

140 De Waal (note 102 above) 6 note 17 indicates that proportionality can also be employed in cases where the court is called upon to balance conflicting rights, because balancing is a form of limitation of rights. This is an oversimplification of the process really taking place when invoking the proportionality principle. There are indications of a similar approach in the *Makwanyane* case – see the discussion of Blaauw-Wolff (note 99 above) 206-208. Woolman (note 105 above) 102-103 refers to this type of balancing as ‘the “head-to-head” comparison of competing rights, values or interests’, which can assume the form of a balancing of one right, interest or value against another. Blaauw-Wolff (note 99 above) 213 equates this approach with the *Güterabwägung* of German jurisprudence and indicates (199) that, although it is followed by some administrative and civil courts in Germany, this approach is controversial and has not been endorsed by the Federal Constitutional Court (*BVerfGE* 7, 198, 208 ff.). She further indicates that only a few academics support this theory in a constitutional context. Many eminent academics have rejected this theory out of hand.

141 I.e. the equality of fundamental rights and the basic premises of democracy are played off against each other, thereby seriously compromising the notion of the constitutional state. Blaauw-Wolff (note 99 above) 214-215.

142 Blaauw-Wolff (above note 99) 102-103 refers to this procedure as the ‘striking [of] a balance’ between competing rights or interests.

143 K Hesse *Grundzüge des Verfassungsrechts* (1993) marginal note 72. Translation: ‘The principle of the unity of the constitution rather requires an optimisation: Both interests should be limited, as both should be optimally effective. ... “Proportionality” in this sense signifies a relation between two interests which could vary in importance, a relation which

Vielmehr stellt das Prinzip der Einheit der Verfassung die Aufgabe einer Optimierung: Beiden Gütern müssen Grenzen gezogen werden, damit beide zu optimaler Wirksamkeit gelangen können. ... 'Verhältnismäßigkeit' bezeichnet in diesem Zusammenhang eine Relation Zweier variabler Größen, und zwar diejenige, die jener Optimierungsaufgabe am besten gerecht wird, nicht eine Relation zwischen einem konstanten 'Zweck' und einem oder mehreren variablen 'Mitteln'.

This would mean that each of the relevant provisions contributes to influencing the solution of the disputing rights without ranking them.¹⁴⁴

- c. 'Interest-balancing' might refer to the interpretation of statutory provisions in a manner complying with the normative principles endorsed by the Constitution.¹⁴⁵ This approach links the interpretation of legal norms¹⁴⁶ with a judicial inquiry into the constitutionality of the legal provisions,¹⁴⁷ to the effect that the constitutional text becomes the most important source for giving effect to specific fundamental rights.¹⁴⁸

In discussing various rules to determine the difference between compensable and non-compensable impositions on property, Michelman¹⁴⁹ refers to 'interest-balancing' as a popular means of determining the legitimacy of the regulatory powers¹⁵⁰ of the state with regard to private property. He explains that it entails a comparison between society's contemplated gain from a specific regulatory measure and the harm that measure will cause to the individual or class of individuals affected. The measure is deemed legitimate if individual losses are found to be 'outweighed by' social gains.¹⁵¹ He then explains that the balancing test is intelligible only if the supposition is that the test determines whether a specific regulatory measure is 'efficient', even though some suffer loss as a result of it, because other people's gains in some sense exceed or overshadow the admitted losses.¹⁵² The ethical premise of this approach, he says,¹⁵³ is that deliberate, collective impositions of individual harm will be tolerated only if they bring a net gain in aggregate welfare. As such, Michelman indicates, interest-balancing is significant only to determine that a minimal condition of legitimacy exists, where the reallocation of resources does not serve an outright purpose of redistributing wealth among the members of society.¹⁵⁴

- d. Finally, proportionality review is a very specific kind of 'interest-balancing.' As part of the proportionality review, the interests of the parties involved that are worthy of protection must be justly balanced and brought into equilibrium. The specific type of patrimonial interest, with its particular characteristics, should also be taken into account. This kind of

would serve the required optimisation best, not a relation between a constant "purpose" and one or more varying "means".

144 Blaauw-Wolf (note 99 above) 214.

145 Ibid.

146 I.e. *Normauslegung*.

147 I.e. *Normenkontrolle*.

148 This is probably also the meaning that Van der Walt 'Limits of Constitutional Property' (note 59 above) 321-322 attaches to interest-balancing when explaining that '[i]n the Constitution there are reasons for the protection of rights and for the limitation of rights, and the proportionality question involves a balancing or consideration of the relative weight of these reasons in the specific context'.

149 F Michelman 'Property, utility and fairness: Comments on the Ethical Foundations of "Just Compensation" Law' 1967 (80) *Harv LR* 1193-1196.

150 'Police power'.

151 Michelman (note 149 above) 1193.

152 Ibid 1194.

153 Ibid 1195.

154 Ibid 1196.

balancing does not, however, exclude (other kinds of) ‘interest-balancing’ at other stages of the inquiry into the constitutional validity of a specific interference with a fundamental right such as property. Hence, the term ‘interest-balancing’ surfaces in several shapes and sizes in the process of determining the constitutional validity of specific interferences with fundamental rights.

As far as property protection and regulation in South Africa is concerned, the issue of ‘interest-balancing’ and its exact meaning overlaps with the question of arbitrariness of a particular imposition on property. A cumulative reading of sections 25 and 36 would require that arbitrariness of an infringement is tested not only when the general applicability of the infringing measure is considered, but also within the proportionality test itself,¹⁵⁵ in the consideration of the rational connection between the limitation and its purported object, and in the means-end analysis.¹⁵⁶ Hence, non-arbitrariness of an encroachment on property can be tested at various stages of the constitutional inquiry of limitations on property. It is necessary, however, to formulate the purpose of a particular inquiry as to non-arbitrariness of a specific measure clearly, as well as the concomitant meaning of non-arbitrariness in that specific context.

Generally, Michelman’s interpretation of Rawls’s theory of ‘justice as fairness’ in the context of compensable takings is instructive with regard to the concept of non-arbitrariness.¹⁵⁷ Two fundamental principles are articulated:

- a. It must be presumed generally that social arrangements should accord no preferences to anyone, but should assure to each participant the maximum liberty consistent with a like liberty on the part of every other participant.
- b. As justification for departures from the first principle, an arrangement entailing differences in treatment is still just if everyone has a chance to attain the positions to which differential treatments attach, and the arrangement can reasonably be supposed to have an effect advantageous for every participant, and especially the one to whom accrues the least advantageous treatment provided for by the particular arrangement.

Michelman further indicates¹⁵⁸ that these two principles are primarily intended to aid evaluation of those fundamental social arrangements that ‘establish the various stations in life to which different packages of lifetime expectations are attached’, thereby indicating the importance of a particular context in determining the content of fairness in a specific case. Applied to the *Nkosi/Bührmann* and *FNB/SARS* disputes, Michelman’s theory of fairness can be significant for a definition of non-arbitrariness in the context of constitutional property protection and regulation in South Africa. As concerns the former dispute, this theory of fairness would entail that individual freedom of both the landowner and the occupier is optimised as far as possible. This would require a specific kind of interest-balancing.

In the *Nkosi/Bührmann* cases the courts attached varying levels of importance to the differing property interests and religious freedom. The manner in which the court undertook the requisite balancing is, however, for the larger part rather disappointing.

Du Plessis J acknowledged that the case required a balancing act between the rights of the

155 Contra De Waal, Currie & Erasmus (note 100 above) 422.

156 Cf the discussion of the South African proportionality test above, based on the framework provided in Blaauw-Wolf (note 99 above).

157 Michelman (note 149 above) 1218-1120.

158 Michelman (note 149 above) 1221.

landowner and the competing tenure rights of the occupants.¹⁵⁹ However, he chose to decide the issue on whether or not rights of residence and use would include burial rights in terms of the Extension of Security of Tenure Act, and therefore never resorted to actually balancing any competing interests.

In a concurring judgment, Satchwell J went somewhat further by considering the various interests of the landowner and the occupier. The interests of the occupier in terms of the ESTA were, however, found to be subject to and defined by the interests of the landowner¹⁶⁰ in a manner perpetuating the hierarchical approach to protection of rights traditionally found in South African private law of property.¹⁶¹

Ngoepe J dissented in a judgment characterised by a more thorough balancing of the various interests at stake, in an approach generally reminiscent of optimisation of interests. He regarded the right to tenure and the freedom of religion of occupants in terms of the ESTA as inextricably linked.¹⁶² His balancing act then involved a consideration of this 'cluster' of tenure rights as against the rights and interests of the landowner. This resulted in the finding that the possible encroachment on landownership that would result from affording burial rights to the Nkosi family was so moderate as not to justify the granting of the interdict requested by the landowner.¹⁶³ This view of Ngoepe J seems plausible, even in view of the fact – as pointed out by Howie JA in the decision of the Supreme Court of Appeal – that 'a grave, practically and legally, effects a permanent diminution of the right of ownership of the land'.

In both the majority decision of the full bench and the decision of Howie JA in the Supreme Court of Appeal, the balancing acts – for what they are worth – are performed without considering the provisions of section 36 of the Constitution, not to mention the dictates of proportionality review. Even Ngoepe J, in his dissent, performs the balancing act simply to find that no infringement occurred on the landowner's right, thus never reaching the second phase of the constitutionality inquiry.

A 'fairness' inquiry in the context of *FNB/SARS* would have to take cognisance of the fact that the state as representative of the public interest (in the form of the Commissioner of Revenue) was directly involved in the dispute, and differential treatment of third-party property when dealing with tax debt would therefore have to be part of the inquiry. Ackerman J, in the Constitutional Court judgment of *FNB/SARS* undertakes a lengthy analysis of the non-arbitrariness requirement and its relation to the inquiry as to constitutional protection and regulation of property.¹⁶⁴ Eventually, it is found¹⁶⁵ that

159 Full-bench decision note 8 above 1151 E-F.

160 Full-bench decision note 8 above 1156C-D. The relevant passage reads: 'The rights granted to the occupier are not rights of ownership. The rights of occupiers are extended but they remain constrained by the rights (and also by the lesser ranked "legitimate interests") of the owners.'

161 For criticisms of the hierarchical approach, see G Pienaar 'The Registration of Fragmented Use-Rights as a Development Tool in Rural Areas' in *Constitution and Law IV*, Seminar Report 6 (2001); AJ van der Walt, 'Property Rights and Hierarchies of Power: A Critical Evaluation of Land-Reform Policy in South Africa' (1999) 64 *Koers* 259 ff; AJ van der Walt 'Marginal Notes on Powerful(l) Legends: Critical Perspectives on Property Theory' 1995 *THRHR* 396 ff; H Mostert 'The Diversification of Land Rights and its Implications for a New Land Law in South Africa' in EJ Cooke (ed) *Modern Studies in Property Law II* (2003) 3-25.

162 Full-bench decision note 8 above 1611-J.

163 Full-bench decision note 8 above 1161E-H. The most striking part of Ngoepe J's balancing act reads: 'Ss 5 and 6, ... of the [Tenure] Act are specifically aimed at making some inroad into [the owner's right of ownership]. ... It cannot be reasonably expected that the respondent exhumes the seven already buried to go and found a new 'home'; ... the area [Mr Bühmann] loses to the grave is probably 1 m by 2 m; and ... in terms of the law as it stands, [the Nkosi family] will in any case still be entitled to visit the existing seven graves.'

164 *FNB/SARS* note 9 above par [64]-[73] and par [105]-[117].

a deprivation of property is ‘arbitrary’ as meant by section 25 when the ‘law’ referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.

Ackerman then provides a number of indicators of the existence of sufficient reason for a deprivation of property. These include a means-ends analysis and a consideration of a complexity of relationships, namely the relationship between the purpose of the deprivation and the affected property holder, and the relationship between the purpose of the deprivation and the nature of the property. He then indicates that where land or corporeal moveable property is at stake, the purpose of deprivation will have to be more compelling than where the property does not qualify as land or corporeal moveables or where the property rights are less extensive. Likewise, where the deprivation is all-embracing, a more compelling purpose would have to be established than in the case where only some incidents of the property are affected, or only partially affected. The judge then supports the idea that non-arbitrariness is a variable,¹⁶⁶ by indicating that the interplay between adaptable means and ends, the nature of the property in a specific instance and the extent of the particular deprivation will in some circumstances result in sufficient reason being established by ‘no more than a mere rational relationship between means and ends’, whilst in other circumstances it will call for a full-blown proportionality review in terms of section 36(1). After applying this standard to the case at hand, and comparing it with the situation in other jurisdictions,¹⁶⁷ Ackerman finds that section 114 of the Customs and Excise Act ‘casts the net far too wide’ and therefore cannot be upheld constitutionally.¹⁶⁸

Ackerman J’s point of departure is that the internal limitations of section 25(1) form a filter to the true second-stage limitation analysis. Accordingly, the non-arbitrariness inquiry is undertaken apart from any possible proportionality review.¹⁶⁹ It means that the non-arbitrariness requirement here is regarded neither as a component of the formal requirement to be met before the proportionality inquiry commences, nor as an element of the ‘reasonableness’ inquiry within the proportionality test itself.¹⁷⁰ The analysis is therefore specifically useful in the present instance. In particular, and in spite of his chosen point of departure, Ackerman J’s approach indicates that the non-arbitrariness inquiry can be relevant in both stages of the process.¹⁷¹

It is important in every case in which section 25(1) is in issue to have regard to the legislative context to which the prohibition against ‘arbitrary’ deprivation has to be applied; and also to the nature and extent of the deprivation. In certain circumstances the legislative deprivation might be such that no more than a rational connection between means and ends would be required, while in others the ends would have to be more compelling to prevent the deprivation from being arbitrary.

Ackerman J refers to non-arbitrariness as a ‘wider concept’ and a ‘broader controlling principle’, which stretches beyond a mere rationality review, whilst, simultaneously, it represents a ‘narrower and

165 See par [105]. Italics added.

166 See par [105](g).

167 See par [74]-[104] where the situation regarding deprivations in the United States, Australia, the Council of Europe, Germany and the United Kingdom is considered, and again par [106]-[113], where the findings are applied to the South African context.

168 See par [114].

169 It is indicated at par [115] that this inquiry focused on the issue of whether a rational connection existed between the deprivation and the purpose for it, after it was indicated at par [105](g) that this type of inquiry is but one function of the requirement of non-arbitrariness.

170 See par [73].

171 See par [69].

less intrusive concept than that of the proportionality evaluation required by ... section 36' of the Constitution.¹⁷² Although this statement might seem contradictory at first glance, it makes perfect sense in view of the fact that rationality review is but a single component of the overall proportionality test. It is somewhat paradoxical, however, for the judge to refer to the proportionality test of section 36 while explicitly expecting the non-arbitrariness requirement (which is an internal limitation of section 25) to be met before one can proceed to the limitation analysis of section 36. Be that as it may, the importance of the Constitutional Court's remarks about non-arbitrariness in the *FNB/SARS* decision is that it embraces the inherent contradictions of constitutional property protection and regulation. It also acknowledges a fluent standard imposed by the arbitrariness requirement: the non-arbitrariness of limitations may be relevant and applicable at practically any point in the inquiry, depending on the specific context in which it is applied. Moreover, this requirement is attributed a specific content in the context of the South African constitutional property clause.¹⁷³

[O]ne should never lose sight of the historical context in which the property clause came into existence. The background is one of conquest, as a consequence of which there was a taking of land in circumstances which, to this day, are a source of pain and tension ... [T]he purpose of section 25 is not merely to protect private property but also to advance the public interest in relation to property ... [A]ll this would be relevant to determining what purpose the word 'arbitrary' was intended to serve in a Constitution which has established a constitutional state and in a provision therein dealing with the protection of property against deprivation by the state.

This is supplemented by the reminder, earlier in the judgment,¹⁷⁴ that the

tension between individual rights and social responsibilities has to be the guiding principle in terms of which the [property clause] is analysed, interpreted and applied in every individual case.

It appears, therefore, that applying the non-arbitrariness requirement in a given case about property protection or regulation represents yet another form of interest-balancing, in which the exercise of value-judgment is unavoidable.

This point is illustrated further by the application of the non-arbitrariness standard in the Supreme Court of Appeal's decision in the *Nkosi/Bührmann* dispute. Howie JA considers, like Ackerman J, the importance of redressing 'past inequities burdening an entire class that was, and still is, seriously disadvantaged economically, educationally and residentially.'¹⁷⁵ Nevertheless, arbitrariness is found – rather unconvincingly¹⁷⁶ – in the fact that a landowner might be at risk of diminution of his or her ownership rights, depending on the religious belief of possible occupiers of the land.

172 See par [68].

173 Par [67].

174 Par [53], quoting AJ van der Walt *The Constitutional Property Clause* (1997) 15-16.

175 See the SCA decision note 8 above 387F-H.

176 It is remarked (decision *a quo* note 8 above 387G-H) that 'to benefit some occupiers and not others would be inconsistent with the Constitution and the objectives of the [Tenure] Act. To the possible rejoinder that the right to bury without the owner's consent is something available to all occupiers which some can simply waive, the answer is, ... that it is simply not possible to deduce the legislative intention to confer that right.' The judge's argument is contradicted already by Ngoepe J's dissenting judgment in the provincial full-bench decision, where it becomes clear that taking religious freedom seriously in a multicultural society like South Africa's, inevitably requires taking a diversity of religions and beliefs seriously. (See the full-bench decision note 8 above 1161B-E.) This necessarily entails shifting the interpretative paradigm, which the Supreme Court Judge seems unwilling to undertake.

IV CONCLUSION: LIBERTY, SOCIAL RESPONSIBILITY AND THE LAYERING OF PROPERTY PROTECTION

In South African constitutional property law, an approach based on the consideration of individual liberty in conjunction with social responsibility would allow interest-balancing at various stages of the constitutionality inquiry. As far as proportionality review is concerned, a measure of interest-balancing the constitutional validity of an interference with property is allowed in the very last stage of the inquiry regarding.¹⁷⁷ Furthermore, a ‘scaling’¹⁷⁸ of the social function of property in the constitutional context is possible.¹⁷⁹ The legislature is given greater freedom to delimit the content of property and to define the restrictions on property where it has a function of specific social relevance. Moreover, the legislature has more latitude to define restrictions on interests that are further removed from the property holder’s personal liberty. The social importance and function of property interests contribute to deciding upon the degree of restriction of the constitutional right to property that would be justifiable in a specific case.¹⁸⁰ This is particularly relevant where different rights must compete and conflict with each other.

Such a ‘scaling’ of the type of protection afforded to different proprietary interests can be important in the determination of the proportionality of a specific interference with property, but can also be employed much earlier in the investigation as to the justifiability of a specific interference with property.¹⁸¹ Because it is based on the principles of the individual liberty and social responsibility underlying the constitutional order in its entirety, it need not be restricted to the very last stage of the constitutionality review as the type of ‘interest-balancing’ requisite for one aspect of proportionality assessment. This approach supports other types of ‘interest-balancing’ at various stages of the investigation into the constitutional validity of any interference with property and cannot be equated to proportionality review. It can be applied to determine the protective ambit of the constitutional property clause, or (as Ngoepe J did) to determine whether an actual imposition on property has occurred, justifying constitutional scrutiny review, or of course, whether the demands of proportionality have been met.

Criticism against a more expansive approach to ‘interest-balancing’, covering all stages of the constitutionality inquiry with regard to property protection and regulation, need to be addressed with reference to the staged approach to the inquiry,¹⁸² and the different viewpoints concerning the appropriate point of departure in the investigation.¹⁸³ In the South African system, the contraction of the ‘threshold’ question as to the protective ambit of the property clause and the question as to the existence of an infringement into a single stage might lead to a disregard of the latter question. Skipping the process of identifying the infringement (that is,

177 This ties in with the function of the proportionality test in German constitutional property law. *Verhältnismäßigkeit* itself is tested only in the last stages of the inquiry.

178 I.e. *Abstufung*.

179 See G Alexander ‘Two Experiences, Two Dilemmas’ in J Maclean (ed) *Property and the Constitution* (1999) 106.

180 For example, investment-based interests are protected to a lesser degree in the constitutional context than an individual’s interest in having a roof over his or her head. In landlord-tenant relations, for instance, rent control and other forms of tenant protection are almost routinely affirmed, because the tenant’s interest is personal and intimately connected with personal liberty, while the landlord’s interest usually is strictly economic. Alexander (note 179 above) 106. This example is based on *BVerfGE* 68, 361 and *BVerfGE* 89, 1.

181 The *Harksen* decision note 6 above is an example of how the issue of whether compensation was payable could have been avoided if more focus was placed on the kind of infringement, before an attempt was made to determine whether the validity requirements for expropriation of property were complied with.

182 See par 3.1 above.

183 See par 3.2 above.

identifying the nature of the action complained of, without attempting to determine its justifiability) could result in confusion about the kind of validity requirements that would be applicable to determine justifiability at a later stage in the inquiry.¹⁸⁴ Focusing more stringently on the nature of a specific imposition on property earlier in the process of determining the constitutionality of such an action would in many cases render it unnecessary to resort to the proportionality inquiry.

The suggested approach renders the use of value judgment or political decision-making unavoidable in the balancing process, regardless of the point of departure preferred.¹⁸⁵ In response to the criticism that might be raised against the approach in that it induces the judiciary to cross the boundaries of political involvement, the inherent political nature of fundamental rights, in particular property,¹⁸⁶ may be mentioned. As Michelman indicates,¹⁸⁷

[The] positivistic inflection of 'property' with [the] naturalistic inflection of 'liberty' ... is no manifestation of anything stably fixed in the concepts of property and liberty. It is a manifestation, rather, of constitutional politics.

In addition, it may be argued that the demands of fairness cannot be equated with any particular political predilection, just as they do not allow a particular 'doctrinal packaging'¹⁸⁸ for all judgments.

Application of this argument to the case analyses of *Nkosi/Bührmann* and *FNB/SARS* yields the following result. Both sets of decisions featured judicial recognition of one of the main purposes of the constitutional property clause in South Africa, namely the need to redress any imbalances there may be in the property regime as a result of the peculiar political history of the country, particularly its influence on land-holding.¹⁸⁹ Stated differently, the Constitution favours the promotion and development of a new property order, in which rights and interests are protected upon considerations of fairness. This may speak against an elevation of real rights above other interests in property under specific circumstances, in particular where the land reform initiative is at stake. As such, the application of the principles of liberty and social responsibility in the context of the *Nkosi/Bührmann* dispute would probably have warranted an outcome permitting the imposition of moderate burdens on the rights of the landowner for the sake of promoting the interests and rights which would further the land reform initiative.

The same considerations of promoting and developing the property order espoused by the constitutional property clause would apply – as Ackermann J also explicitly acknowledges – in cases like *FNB/SARS*, which are not even remotely related to land reform.¹⁹⁰ Under these circumstances, however, the interests at stake are viewed in a different light, and the demands of fairness require support from the constitutionally entrenched individual liberty in the sense

184 The decision in *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC). AJ van der Walt & H Botha 'Coming to Grips with the New Constitutional Order: Critical Comments on *Harksen v Lane*' 1998 *SAPL* 17-41 is an example of how the issue of whether compensation was payable could have been avoided if more focus was placed on the kind of infringement, before an attempt was made to determine whether the validity requirements for expropriation of property were met.

185 Michelman (note 42 above) 580.

186 Michelman 'Property as a Constitutional Right' (note 2 above) 1112.

187 F Michelman 'Property, Federalism and Jurisprudence: A Comment on *Lucas* and Judicial Conservatism' 1993 (35) *William and Mary LR* 307.

188 Michelman (note 149 above) 1250.

189 See the discussion above.

190 See the discussion above.

of material well-being, independence and freedom, rather than the social responsibility as far as issues like taxation are concerned.

In this regard, Michelman's insight¹⁹¹ must be restated for the South African context: the courts are called upon to make bold value judgments in testing impositions on property against the norms of our Constitution. To refrain from this duty on the basis that it belongs to the business of morals or politics, and not law, will result in the corruption of a regime of property, which was constitutionally intended to be freed from the shackles of our history and advanced to a level at which individual freedom and social responsibility combine to form a vital force in the continual restructuring and reshaping of the property law order.

¹⁹¹ Michelman in Van Maanen & Van der Walt (note 29 above) 450.

ANDRÉ VAN DER WALT

A SOUTH AFRICAN READING OF FRANK MICHELMAN'S THEORY OF SOCIAL JUSTICE¹

I STRIVING FOR SOCIAL JUSTICE

Harmony: Harmony contends with the ideas and relationships of various pitches as they sound simultaneously together. The relationships are both spatial and temporal. ... Harmonies are built vertically with a combination of tones at the same time. Composers generally concentrate on the horizontal melodic line as their primary concern but the verticality is also important. ... When the horizontal portions of music are composed in combination, counterpoints are often achieved. Counterpoint, one line against the other through parallels, divergence and convergence, is another form of harmonic structure.

All Music Guide Glossary <<http://allmusic.com/cg/amg.dll?p=amg&sql=S2386>>

Yacoob J introduced the South African Constitutional Court's unanimous decision in *Grootboom* with the following observation:

The people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone. The preamble to our Constitution records this commitment.²

For a society characterised by vast poverty and social, political and economic divisions institutionalised along racial lines, this is a significant statement. In referring to the attainment of

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- 1 I dedicate this essay to Frank Michelman as a token of my admiration and my gratitude for continued opportunities to learn and benefit from his knowledge, understanding and enthusiasm. Thanks also to Geo Quinot, Theuns Möller and Maartje Eefting for research assistance, to Greg Alexander, Henk Botha, Danie Brand, Karl Klare, Laura Underkuffler-Freund, Karin van Marle, Johan van der Walt and Servaas van der Berg for discussion, comments and assistance; to members of the Faculty of Law at the University of South Africa who attended a seminar where I discussed a first outline of this essay in November 2001, participants in the biannual Reading Property Conference in March 2002 and in the annual Colloquium of the Research Unit for Legal and Constitutional Interpretation at the University of the Western Cape in July 2002 where I discussed draft sections of this essay, and to the students in my 2001 Advanced Legal Theory seminar (Theuns Möller, Chris Siebrits and Danie Smit) for the opportunity to explore some of the issues addressed here with them. The remaining errors and shortcomings are my own. This publication is based upon work supported by the National Research Foundation under grant number 2050532. Any opinion, findings and conclusions or recommendations expressed in this essay are those of the author and do not necessarily reflect the views of the National Research Foundation.
 - 2 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) par [1] at 53B–C, per Yacoob J for a unanimous Court. The passages in the preamble to the 1996 Constitution Yacoob J probably had in mind read: 'We, the people of South Africa – Recognise the injustices of our past; ... We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to – ... Heal the divisions of the past and *establish a society based on democratic values, social justice and fundamental human rights*; ... *Improve the quality of life of all citizens* and free the potential of each person; ...' (emphasis added.)

social justice and the improvement of everyone's quality of life, Yacoob J's dictum draws attention to the following aspects:

- (i) Even now, after the establishment of a constitutional democracy, social justice does not prevail in South African society – it has to be attained through reform and transformation.
- (ii) Social justice involves and is premised upon a number of fundamental rights such as equality and human dignity, but a particularly important aspect is socio-economic support and upliftment – 'improving everyone's quality of life'.
- (iii) Neither social justice nor improved quality of life can be established at once, and therefore the focus has to be on attainment of these goals over time.
- (iv) However, the attainment of social justice and improved quality of life is not an empty promise or a hollow aspiration either – it is a constitutional commitment, which means that it has to be pursued in compliance with constitutional obligations and requirements.

Each of these observations finds support in the South African Constitution of 1996:

- (i) The Constitution is premised upon the need to establish social justice, and a number of provisions allow for corrective action to address existing inequalities and injustices through affirmative processes.³
- (ii) Social and economic upliftment is a fundamental constitutional goal, and despite a heated debate during the drafting stages of the two constitutions,⁴ special provisions were included in the Constitution to promote and guarantee social and economic rights.⁵

3 See s 9(2): 'Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.' See further the preamble and chaps 4 and 5 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, promulgated in compliance with s 9(4) of the Constitution. Another example is s 25(6) of the Constitution: 'A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure, or to comparable redress.' The most important laws promulgated in compliance with this provision are the Land Reform (Labour Tenants) Act 3 of 1996, the Communal Property Associations Act 28 of 1996, the Interim Protection of Informal Land Rights Act 31 of 1996, the Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

4 The following were important early contributions to the debate about the inclusion of a socio-economic rights provision in the Constitution: H Corder et al *A Charter for Social Justice: A Contribution to the South African Bill of Rights Debate* (1992); DM Davis 'The Case against the Inclusion of Socio-Economic Demands in a Bill of Rights except as Directive Principles' (1992) 8 *SAJHR* 475–490; N Haysom 'Constitutionalism, Majoritarian Democracy and Socio-Economic Rights' (1992) 8 *SAJHR* 451–463; E Mureinik 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *SAJHR* 464–474; B de Villiers 'The Socio-Economic Consequences of Directive Principles of State Policy: Limitations on Fundamental Rights' (1992) 8 *SAJHR* 188–199; B de Villiers 'Socio-Economic Rights in a New Constitution: Critical Evaluation of the Recommendations of the South African Law Commission' 1992 *TSAR* 421–436; E de Wet 'Can the Social State Principle in Germany Guide State Action in South Africa in the Field of Social and Economic Rights?' (1995) 11 *SAJHR* 30–49; S Liebenberg 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) 11 *SAJHR* 359–378; P de Vos 'The Economic and Social Rights of Children and South Africa's Constitution' (1995) 10 *SAPL* 233–259; P de Vos 'Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* 67–101.

5 Or, as they are most often referred to in this discourse, socio-economic rights. In this article I mostly refer to these rights as 'social and economic rights'. The meaning and significance of terminology is discussed below. The most important examples of social and economic rights provisions are subsec 25(5) ('The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.');

26(1) ('Everyone has the right to have access to adequate housing.');

27(1) ('Everyone has the right to have access to – (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their

- (iii) The Constitution does not simply guarantee social and economic rights, but explicitly provides for the progressive realisation of those rights.⁶
- (iv) The rights in Chapter 2 of the Constitution bind the legislature, the executive, the judiciary and all organs of state,⁷ and the *Grootboom* decision⁸ makes it clear that the social and economic provisions in the Constitution create enforceable rights: that the state has to make a reasonable effort to comply with its constitutional duties and obligations to realise those rights, and that the courts will enforce them.⁹

In South Africa, social and economic rights assume their political, legal and theoretical importance from their transformative context, which is characterised by racially institutionalised and often extreme poverty and human suffering and by the constitutional commitment to alleviate or eradicate poverty through reform and transformation. Since the interim Constitution was adopted in 1993, politicians, lawyers and political and legal theorists from around the world have expressed interest in the transformative context within which the South African Constitution functions,¹⁰ and in the rare example it offers of explicitly guaranteed social and economic rights.¹¹ As a result, the constitutional provisions relating to social and economic rights are at the centre of a lively and fascinating theoretical debate, as is illustrated by the growing list of publications and conferences on the topic. The theme I want to address in adding to that list is the coherence and the implications of various theories of social and economic rights in a transformation-oriented context.

I am particularly interested in theories of social and economic rights in the limited sense of more or less consistent theoretical frameworks within which the constitutional entrenchment and judicial enforcement of these rights are or can be justified and explained in a way that makes sense to lawyers. Furthermore, I restrict myself to a specific kind of theoretical discourse. Subsequent to promulgation of the 1993 and 1996 South African constitutions, debates

dependants, appropriate social assistance.'); 28(1)(c) ('Every child has the right – ... to basic nutrition, shelter, basic health care services, and social services; ...').

6 Ss 26(2) (housing); 27(2) (health care, food, water, and social security); 29(1)(b) (further education); arguably 25(5) (equitable access to land). See the previous fn above.

7 S 8(1).

8 Fn 1 above.

9 *Grootboom* (fn 1 above) par [21]–[25] at 61F–62H (general approach of the Court to the interpretation of s 26), par [80]–[92] at 83H–86B (application to facts in this case), summarised in par [93]–[95] at 86C–G: the Constitution obliges the state to act positively, by providing access to housing, health care, food, water, social security and land, to ameliorate poverty and suffering; this obligation has to be carried out within the state's available resources and progressively, but 'despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce'. (Par [94] at 86E, emphasis added.) See further P de Vos (1997) 13 *SAJHR* 67–101 (fn 3 above).

10 See KE Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146–188; a remarkable example of a US scholar explaining his theory of transformative constitutionalism with reference to the South African context. See further Cass R Sunstein 'Social and Economic Rights? Lessons from South Africa' (2001) 11 *Constitutional Forum* 123; Theunis Roux 'Understanding *Grootboom* – A Response to Cass R Sunstein' (2002) 12 *Constitutional Forum* 41–51; D Moseneke 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18 *SAJHR* 309–319. I agree with Roux that Sunstein's terms 'preservative' and 'transformative' should be seen as opposite ends on a spectrum of possible constitutions, and not as descriptive categories.

11 International interest was aroused not only by the *Grootboom* housing case, but also by the more recent *TAC* case in which the government was ordered to provide pregnant women who tested positive for HIV with antiretroviral drugs to prevent mother-child transfer of the virus: *Treatment Action Campaign and Others v Minister of Health and Others* 2002 (4) BCLR 356 (T); *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC). The *TAC* case is discussed separately below. For electronic versions of the decisions see <http://www.tac.org.za/>.

about the wisdom of constitutionalising social and economic rights¹² gave way to concerns about the practical enforcement of those rights,¹³ a shift of emphasis that generally heralded a simultaneous loss of interest in theoretical themes unrelated to the separation of powers and the countermajoritarian dilemma.¹⁴ These institutional topics are undoubtedly important,¹⁵ but their implications for a general theory of social and economic rights should not be overemphasised to the exclusion of other theoretical issues.¹⁶ Therefore I want to explore a different aspect of the theory, namely the attempt to justify and explain the constitutional entrenchment or enforcement of social and economic rights within more or less coherent theoretical frameworks premised upon one or more substantive, non-institutional principles such as human dignity, equality, social solidarity or state responsibility. My basic premise is that the debate about social justice and the policies and practices concerned with social and economic upliftment can benefit from greater theoretical clarity about the coherence and validity of non-institutional reasons for the constitutional entrenchment and judicial enforcement of these rights. In addition, I shall argue that greater clarity about theoretical arguments can open up space for

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- 12 See the sources in fn 3 above for the South African entrenchment debate. The entrenchment debate admittedly never really got much further than themes surrounding the countermajoritarian dilemma in developing a philosophical and theoretical position on social and economic rights.
 - 13 One important exception to this general observation is a recent article in which equality jurisprudence is proposed as a paradigm for the development of jurisprudence about socio-economic rights: P de Vos 'Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness' (2001) 17 *SAJHR* 258–276. De Vos's view is discussed separately below. Another exception is an article by M Pieterse 'Beyond the Welfare State: Globalization of Neo-Liberal Culture and the Constitutional Protection of Social and Economic Rights in South Africa', forthcoming (2003) 14 *Stell LR*. Pieterse enters into a serious and important debate about globalisation and the neoliberal departure from the welfare state and the effects of these economic movements on the protection of social and economic rights. Despite its obvious importance, the globalisation debate is not discussed in this article.
 - 14 South African courts' attitude is not clearly based on or inspired by a single, consistent or explicit theoretical framework, and it is probably fair to say that recent case law is informed by debates about the separation of powers and the role of the courts in a constitutional democracy rather than by theory about social and economic rights as such. The most important cases among the emerging decisions on social and economic rights are *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC); *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC); *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 (7) BCLR 652 (CC); *Treatment Action Campaign and Others v Minister of Health and Others* 2002 (4) BCLR 356 (T); *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC). Court cases make extensive use of equality and poverty rhetoric (*Grootboom*), but the arguments are mostly concerned with the powers and jurisdiction of the courts. Scrutiny of legislation and executive action may appear either lenient (*Soobramoney*, *Kyalami*) or strict (*Grootboom*, *TAC*), but in fact the benchmark for review (although largely undeveloped and incoherent) is low threshold rationality review combined with deference towards the democratic legislature. For more detailed analysis see De Vos (2001) 17 *SAJHR* 258–276 (previous fn above); S Liebenberg 'The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa' (2001) 17 *SAJHR* 232–257; C Scott & P Alston 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*'s Legacy and *Grootboom*'s Promise' (2000) 16 *SAJHR* 206–268.
 - 15 I use the term 'institutional topics' here to refer to theoretical issues concerning the separation of powers and the countermajoritarian dilemma and their implications for a theory about the entrenchment and enforcement of social and economic rights in a constitutional democracy. To my mind the best recent South African analysis and evaluation of the topic is H Botha 'Democracy and Rights: Constitutional Interpretation in a Postrealist World' (2000) 63 *THRHR* 561–581; H Botha 'The Legitimacy of Legal Orders (1): Introducing the Problem' (2001) 64 *THRHR* 177–191; 'The Legitimacy of Legal Orders (2): Towards a Disruptive Concept of Legitimacy' (2001) 64 *THRHR* 368–383; 'The Legitimacy of Legal Orders (3): Rethinking the Rule of Law' (2001) 64 *THRHR* 523–543.
 - 16 To the same effect see F I Michelman 'The Constitution, Social Rights, and Liberal Political Justification' (2002) 1 *Int J Const Law* (forthcoming – manuscript kindly provided by Frank Michelman and on file with the author), who also describes an approach that reduces the debate about constitutionalisation of social rights to concerns about the separation of powers as 'inadequate'.

increased creativity and diversity in generating and developing further and perhaps stronger arguments in support of the promotion of social justice in general.

In the analysis below, I initially focus on two contrasting theoretical approaches to the need for and justification of constitutionally entrenched and judicially enforceable social and economic rights. The first, traditional lawyers' approach is centred on the concept of rights, and relies on extensive or accommodating interpretations and applications of that concept to protect social and economic rights. The point of departure is well known and comforting to lawyers: wherever there is a right, there has to be a remedy. I shall develop three variations on the rights-based theme to illustrate the approach, with reference to property rights, procedural justice rights, and equality rights respectively. The second, less traditional and less comfortable approach is centred around the notion of weakness rather than strength (in the absence of rights there is no compelling legal reason for the existence of a remedy), and relies on moral or psychological responses to absolute need or intolerable individual suffering to explain and justify the entrenchment and enforcement of social and economic rights. Frank Michelman worked out the constitutional basis of four variations of this theme that I develop in the third section of the essay. In the fourth and final section I revisit and evaluate the strengths and weaknesses of the rights-based and needs-based approaches from a South African perspective (and in the context of the rights-critique discourse of the 1980s), and then I sketch the outlines of a transformation-oriented response to both. The response is based on the premise that the rights-based and needs-based approaches, individually or taken together, are incapable of addressing all aspects of social justice in a transformative context. In the final section, I sketch out some of the implications and ramifications of a transformation-based approach to the theory of social justice.

II TRADITIONAL RIGHTS-BASED THEORY

Cantus firmus: The Latin term for 'fixed melody', cantus firmi was used during the fourteenth, fifteenth and sixteenth centuries as the foundation for polyphonic music. The melody, or any voice of the music, was based on a pre-existing melody from sacred or secular works as well as plainchant melodies. The harmonies were structured around the cantus firmus, which were usually long note melodic lines. As developments occurred in music the cantus firmus did not remain in one voice of the polyphony but would shift from one voice to another. During the fourteenth and fifteenth centuries the cantus firmus would comprise the basis for an entire mass movement eventually leading to the foundation for an entire mass.

All Music Guide Glossary <<http://allmusic.com/cg/amg.dll?p=amg&sql=S2574>>

(a) Background

Traditional theories of socio-economic rights are based – like all theories of rights in the Western tradition – on notions of right or entitlement, in other words on relative strength or power, the point of departure being that a constitutional remedy can be recognised or created and enforced justifiably once a constitutional right has been identified. Moreover, it is assumed that (at least in a constitutional setup where social and economic rights are not protected explicitly) subsumption of social and economic rights under one of the traditionally 'stronger' constitutional rights would advance the cause, not only because recognition of the right would

then be easier, but also because infringements would be subjected to stricter control and judicial scrutiny. In this spirit, arguments have been advanced to explain and justify the entrenchment and enforcement of social and economic rights on the basis of property, procedural justice, and equality. In constitutional settings where social and economic rights are recognised and entrenched explicitly, the alignment of these rights with ‘stronger’ constitutional rights such as property, administrative justice or equality has no direct function in justifying or supporting the constitutionalisation of social and economic rights, but experience proves that it remains relevant as an interpretation strategy to explain and justify the judicial enforcement (as opposed to constitutional entrenchment) of social and economic rights against the legislature and the executive.

(b) Property-Based Theory¹⁷

In *The New Property*,¹⁸ Charles Reich famously argues that claims to participate in state wealth (the ‘new property’)¹⁹ have come to serve the same social purpose in postwar American society that was traditionally served by property ownership, namely to secure individual autonomy against state interference. Accordingly, Reich proposed that these participation claims should enjoy the same strong constitutional protection traditionally granted to property owners²⁰ to secure an enclave of individual independence against state regulation.²¹ Traditionally, claims to

17 This section of the essay was written earlier and featured separately as a paper read at the Reading Property Conference 2002: ‘Protecting Social Participation Rights Within the Property Paradigm: A Critical Reappraisal’ in E Cooke (ed) *Modern Studies in Property Law* vol II 27–42 (2003). Parts of this section of the essay and the conference paper are identical.

18 CA Reich ‘The New Property’ (1964) 73 *Yale LJ* 733–787; see also Reich ‘Individual Rights and Social Welfare: The Emerging Legal Issues’ (1965) 74 *Yale LJ* 1245–1257; Reich ‘Beyond the New Property: An Ecological View of Due Process’ (1990) 56 *Brooklyn LR* 731–745. Reich was not the first person to use the notion of ‘new property’ with reference to social welfare rights; see RJ Lynn ‘Legal and Economic Implications of the Emergence of Quasi-Public Wealth’ (1956) 65 *Yale LJ* 786–805. For commentaries on Reich’s article see GS Alexander ‘The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis’ (1982) 82 *Col LR* 1545–1599; W van Alstyne ‘Cracks in “The New Property”: Adjudicative Due Process in the Administrative State’ (1977) 62 *Cornell LR* 445–493; R Sackville ‘Property, Rights and Social Security’ (1978) 2 *Univ NSW LJ* 246–266; Stephen F Williams ‘Liberty and Property: The Problem of Government Benefits’ (1983) 12 *J Leg Studies* 3–40; RA Epstein ‘No New Property’ (1990) 56 *Brooklyn LR* 747–775; Paul R Verkuil ‘Revisiting the New Property after Twenty-Five Years’ (1990) 31 *William & Mary LR* 365–373.

19 Reich (1964) 73 *Yale LJ* 733–787 (fn 17 above) 734–737 discussed the following claims on state wealth: direct income and benefits (social security benefits, unemployment compensation, aid to dependent children, veteran benefits, welfare benefits), state jobs; occupational licences administered by the state; state grants and concessions (taxi and other licences, television and radio frequencies, public transport permits, air transport routes, liquor licences); state contracts; state subsidies; access to and use of state resources (airports and harbours, public land, and other resources used free of charge); use of state facilities and services (postal services, insurance, state subsidised research information). Reich’s notion of new property includes but extends beyond what is commonly referred to as socio-economic rights, and includes both welfare rights in the narrow sense and commercially exploitable state grants such as licences and permits.

20 Reich does not simply classify participation claims as property, but proposes equal protection for claims that serve the same social purpose as property. The effect is accurately described as ‘propertizing welfare benefits’: GS Alexander *Commodity & Propriety: Competing Visions of Property in American Legal Thought 1776–1970* (1997) 363.

21 Reich (1964) 73 *Yale LJ* 733–787 (fn 17 above) 733: ‘The institution called property guards the troubled boundary between individual man and the state. It is not the only guardian; many other institutions, laws, and practices serve as well. But in a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of individuality.’

participate in state wealth²² are regarded as conditional gratuities that can be withheld or revoked in the public interest,²³ and Reich argues that increasing dependence on the public interest state²⁴ therefore creates a new feudalism:²⁵ participants depend on the state for their survival, but enjoy no security because the state can unilaterally terminate their participation.²⁶ Reich's aim is to create a new zone of privacy,²⁷ where the individual is free from state regulation,²⁸ by erecting a barrier of new property guarantees that secures the individual's status as participant in state wealth, just like the traditional barrier of property ownership used to protect personal freedom.²⁹ For that purpose it is necessary that new property interests should not be treated as conditional gratuities, but as vested rights similar to traditional property ownership, which enjoys constitutional protection against state regulation.³⁰

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- 22 Reich (1964) 73 *Yale LJ* 733–787 (fn 17 above) 733: 'One of the most important developments in the United States during the past decade has been the emergence of government as a major source of wealth... Government has always had this function. But while in early times it was minor, today's distribution of largess is on a vast, imperial scale... The valuables dispensed by government take many forms, but they all share one characteristic: They are steadily taking the place of traditional forms of wealth – forms, which are held as private property... The wealth of more and more Americans depends on a relationship to government.'
- 23 Reich (1964) 73 *Yale LJ* 733–787 (fn 17 above) 774: 'Reduced to simplest terms, the "public interest" has usually meant this: government largess may be denied or taken away if this will serve some legitimate public policy.'
- 24 Reich (1964) 73 *Yale LJ* 733–787 (fn 17 above) 778: 'Ahead there stretches – to the farthest horizon – the joyless landscape of the public interest state. The life it promises will be comfortable and comforting. It will be well planned – with suitable areas for work and play. But there will be no precincts sacred to the spirit of individual man.'
- 25 Reich (1964) 73 *Yale LJ* 733–787 (fn 17 above) 768: 'The philosophy of [the case law] resembles the philosophy of feudal tenure. Wealth is not "owned" or "vested" in the holders. Instead, it is held conditionally, the conditions being ones, which seek to ensure the fulfilment of obligations imposed by the state. Just as the feudal system linked lord and vassal through a system of mutual dependence, obligation, and loyalty, so government largess binds man to the state.' The most important form of wealth belongs to the state, and claimants are appointed as participants on the basis of contingent gratuities depending on their status and on the public interest, much as with land rights in the feudal system.
- 26 Reich (1964) 73 *Yale LJ* 733–787 (fn 17 above) 733: 'The growth of government largess, accompanied by a distinctive system of law, is having profound consequences. It affects the underpinnings of individualism and independence. It influences the workings of the Bill of Rights. It has an impact on the power of private interests, in their relation to each other and to government. It is helping to create a new society.'
- 27 Reich (1964) 73 *Yale LJ* 733–787 (fn 17 above) 778: 'If individualism and pluralism are to be preserved, this must be done not by marching backwards, but by building these values into today's society. If public and private are now blurred, it will be necessary to draw a new zone of privacy. If private property can no longer perform its protective functions, it will be necessary to establish institutions to carry on the work that private property once did but can no longer do. In these efforts government largess must play a major role.'
- 28 Reich (1964) 73 *Yale LJ* 733–787 (fn 17 above) 785: '... there must be a zone of privacy for each individual beyond which neither government nor private power can push – a hiding place from the all-pervasive system of regulation and control.'
- 29 Reich (1964) 73 *Yale LJ* 733–787 (fn 17 above) 785: 'Finally, it must be recognised that we are becoming a society based on status – status deriving primarily from source of livelihood. Status is so closely linked to personality that destruction of one may well destroy the other. Status must therefore be surrounded with the kind of safeguards once reserved for personality.'
- 30 Reich points out that property ownership was also initially granted conditionally and subject to state cancellation and regulation, only sedimenting into the secure and constitutionally protected rights they are over time – the fact that new property interests in state wealth are granted conditionally and subject to regulation does not prevent these rights from also developing into strong, secure rights. The current strong guarantee enjoyed by property ownership is based on the social and political value of private ownership and not on the inherent value of the property involved, and since participation claims in state wealth are also social constructs that fulfil a similar function, the acceptability and scope of state regulation of these claims should also be determined with reference to their function rather than their origin. Participation claims that serve important social and political functions such as personal independence should consequently enjoy strong constitutional protection.

Reich states the following principles upon which the protection of new property interests should depend.³¹ Firstly, the state should not be allowed to abuse its control over participation in state wealth to 'buy out' other constitutional rights or claims by way of trade-offs or sacrifices.³² Secondly, legislative powers to interfere with new property rights should be restricted substantively³³ and state regulation of new property should increasingly be subjected to procedural controls.³⁴ Finally, at least some participation claims³⁵ that are currently regarded as unenforceable gratuities should be transformed into vested or acquired (and therefore constitutionally protected) rights so that the new property can indeed safeguard personal independence.³⁶

Reich's theory of new property had limited impact on the development of US case law,³⁷ but the significant point for present purposes is that Reich's theory promotes the protection and enforcement of new property rights on the basis of the same theoretical framework that supports the protection and enforcement of traditional property ownership. By using a desert-based, exclusionary property model as the basis of his theory of new property, Reich paradoxically confirms (rather than unsettles) the traditional hierarchy of rights, according to which the protection of interests depends on their recognition as vested rights in terms of established legal principles.³⁸ Instead of improving the current unequal division of wealth, this approach actually exacerbates inherent inequalities in the current situation, because it reduces the debate about wealth and poverty in a constitutional democracy to a mechanical process in which everything depends on the classification of recognised and protected versus unrecognised and unprotected interests, inside versus outside the circle of advantage, while more difficult questions about the reasons and motivation for inclusion and exclusion remain unasked and unanswered. In short, it is impossible (or at least very difficult) to extend social and economic rights to the poorest and most vulnerable members of society within the property-based theory.

31 Reich (1964) 73 *Yale LJ* 733–787 (fn 17 above) 779–786.

32 Reich (1964) 73 *Yale LJ* 733–787 (fn 17 above) 779. When the claims of an individual participant and the public interest are weighed against each other in court, no weight should attach to the perception that claims for state support are mere gratuities: Reich 781.

33 Reich (1964) 73 *Yale LJ* 733–787 (fn 17 above) 782–783 mentions three examples: a sensible notion of relevance to prevent all kinds of other matters from being regulated through the regulation of new property; restriction of discretions in the granting, withdrawal and cancellation of welfare support; and a complete ban on privatisation of the power to formulate policy regarding welfare rights.

34 Reich (1964) 73 *Yale LJ* 733–787 (fn 17 above) 783.

35 Namely the rights directly relating to individual autonomy and independence.

36 Reich (1964) 73 *Yale LJ* 733–787 (fn 17 above) 785.

37 In *Goldberg v Kelly* 397 US 254 (1970) 261–262 the Supreme Court adopted Reich's argument that recipients of statutory welfare benefits have a right to receive those benefits and not a mere privilege or gratuity, and that they accordingly have a right to be heard before those benefits are cancelled, especially when cancellation would have a disastrous effect for economically vulnerable recipients. This decision made arbitrary cancellations of benefits more unlikely, and the Supreme Court adopted Reich's argument that nobody should be prevented or discouraged indirectly – through the granting or cancellation of state-granted benefits – from exercising their other fundamental rights (*Keyishan v Board of Regents of State Colleges v Roth* 385 US 589 (1967); *Perry v Sindermann* 408 US 593 (1972); *Elrod v Burns* 427 US 347 (1976)). However, in *Mathews v Eldridge* 424 US 319 (1976) 335 it was decided that a full evidentiary hearing was not required before disability benefits are terminated, and in later decisions it was suggested that the right to procedural fairness might be subject to statutory conditions under which the benefit was granted.

38 This criticism against Reich's theory was worked out by Verkuil (1990) 31 *William & Mary LR* 365–373 (fn 17 above) at 365–367, 369.

(c) Procedural Fairness-Based Theory

In a sense, Reich's aim with his theory of new property was limited, namely to restrict the insecurity of state-granted welfare and commercial benefits (gratuities) by subjecting their regulation to due process control, rather than extending rights to those who have nothing to begin with. He reached this limited result by redefining already existing but weak benefits in such a way that they qualify as strong (due process protected) property rights. At the risk of oversimplification one can say that Reich approached the matter from the direction of an expansion of the property guarantee (which includes the kind of due process protection he was looking for)³⁹ rather than from a general expansion of the due process principle, because the latter strategy could have looked like a revival of substantive due process and met with considerable resistance in US law.⁴⁰

More or less the result Reich was striving for was obtained in South African law and elsewhere by way of the doctrine of legitimate expectation,⁴¹ which extends the notion of due process or procedural fairness to ensure that certain claims, interests or benefits that do not

39 The US Bill of Rights does not protect socio-economic rights or procedural fairness directly – the due process provision in the Fifth and Fourteenth Amendments protects specific rights ('No state shall deprive any person of life, liberty, or property without due process of law ...') and not due process in general (*Board of Regents of State Colleges v Roth* 408 US 564 (1972) 569–571; Van Alstyne (1977) 62 *Cornell LR* 445–493 (fn 17 above) 451–452).

40 State interference with political and personal liberties is traditionally subjected to a stricter procedural due process test, while state regulation of economic and commercial interests is therefore largely left in the discretion of the legislature. The distinction originated in the famous Footnote 4 in Stone J's opinion for the Supreme Court in *United States v Carolene Products Co* 304 US 144 (1938) 152 n 4: alleged interferences with economic rights are subjected to minimal scrutiny, but state action that interferes with individual or political liberties is subjected to strict scrutiny. The Supreme Court never explicitly subscribed to this dichotomy, but it did influence subsequent decisions. See R Funston 'The Double Standard of Constitutional Protection in the Era of the Welfare State' 1975 *Pol Science Q* 261–287. The double standard of review was criticised in *Lynch v Household Finance Corp* 405 US 538 (1972). The tendency to leave state regulation of economic and commercial interests in the discretion of the legislature results from reaction against the antiregulation effect of laissez faire economic policy in the substantive due process decisions dating from the *Lochner* court of the 1930s – see Tribe *American Constitutional Law* (2nd ed 1988) 567–586, 685–753, 769–784; Alexander (1997) (fn 17 above) 264ff, 275, 311ff, 315, 317, 331–334, 340–349 for an overview; *Lochner v New York* 198 US 45 (1905); *Coppage v Kansas* 236 US 1 (1915). During the *Lochner* era the Supreme Court subjected the Roosevelt government's New Deal legislation to substantive review and declared a whole range of social welfare legislation invalid, resulting in serious questions about judicial activism and the separation of powers (the countermajoritarian difficulty; see Botha (2000) 63 *THRHR* 561–581 (fn 14 above)). In the 1930s the Supreme Court abandoned the substantive due process approach in *West Coast Hotel Co v Parrish* 300 US 379 (1937) and switched to a so-called objective approach, in terms of which the courts would not interfere with statutory regulation of economic interests unless other fundamental rights were interfered with in the process. Since then the procedural due process guarantee has been interpreted as a formal guarantee that leaves the regulation of economic matters to the legislative and administrative branches of government (deference). The courts' lack of enthusiasm for the development in *Goldberg v Kelly* should probably be seen as fear for the impression of a return to the substantive due process review of the *Lochner* era. Funston 1975 *Pol Science Q* 261 (fn 17 above) 266: '... the Court more than lowered its sights; it gave up the hunt altogether.' Funston 270 refers to a case decided only 14 days after *Kelly* and that already reverted to deference: *Dandridge v Williams* 397 US 471 (1970) 485; see further *James v Valtierra* 402 US 137 (1971); *San Antonio Independent School District v Rodriguez* 411 US 1 (1973).

41 This doctrine originated in the UK in the decision of *Schmidt and Another v Secretary of State for Home Affairs* [1969] 2 Ch 149, [1969] 1 All ER 904 (CA), later endorsed by the House of Lords in *O'Reilly v Mackmann and Other Cases* [1982] 3 All ER 1124 (HL). This development was followed in Commonwealth countries, see e.g. the Australian decision in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 (FC) for a discussion of the doctrine of legitimate expectation and criticism against it. In South Africa the doctrine was adopted in *Administrator, Transvaal and Others v Traub* 1989 (4) SA 731 (A) and followed in a number of later cases. However, the extending effect of the doctrine in common law review is uncertain in the new constitutional context; see fn 47 below.

qualify as vested or acquired (property or non-property) rights can nevertheless enjoy the protection of due process or procedural fairness principles. In *Administrator, Transvaal v Traub*⁴² this doctrine was accepted and applied in South African law on the basis that persons who have a legitimate expectation of a certain outcome (but not a vested or acquired right in that outcome) are entitled to a fair hearing before an administrative decision is taken that would result in the expected outcome not being realised. According to the doctrine, a person can acquire a legitimate expectation on the basis of a long-standing or regular practice⁴³ or a promise or undertaking made by the administrative agency.⁴⁴ In recent cases, the notion of a legitimate expectation was apparently extended even further by applying it in situations where it was difficult to discern the regular practice or promise on which the legitimate expectation was supposed to rest.⁴⁵ It is unclear whether the expectations protected in terms of this doctrine are purely procedural in nature,⁴⁶ or whether they could also be substantive expectations that could translate into a substantive benefit.⁴⁷ Under the new Promotion of Administrative Justice Act 3 of 2000, the notion of a right to a fair hearing based on a legitimate expectation was retained, albeit possibly in a more restricted form.⁴⁸

42 1989 (4) SA 731 (A). This case was followed in numerous subsequent decisions, the most important of which are *Claude Neon Ltd v City Council of Germiston* 1995 (3) SA 710 (W); *Oranje-Vrystaatse Vereniging vir Staatsondersteunde Skole v Premier van die Provinsie Vrystaat* 1996 (2) BCLR 248 (O); *Public Servants Association of South Africa v Minister of Justice* 1997 (3) SA 925 (T); *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC); *Nortjé v Minister van Korrektiewe Dienste* 2001 (3) SA 472 (SCA).

43 In *Traub*, the applicants relied on a long-standing appointment practice, which created the expectation that the same practice would continue in future, or that they would be afforded a hearing before a decision was taken contrary to that practice.

44 See Cora Hoexter (with Rosemary Lyster) *The New Constitutional and Administrative Law* (ed I Currie) vol II: *Administrative Law* (2002) 209–211, 215–222; DM Pretorius ‘Ten Years after *Traub*: The Doctrine of Legitimate Expectation in South African Administrative Law’ (2001) 117 *SALJ* 520–547 for a general explanation and reference to relevant South African case law. This is also in line with the position in the UK; see *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 (HL) 949h.

45 Hoexter *Administrative Law* (2002) (previous fn above) 217, with reference to *Nortjé v Minister van Korrektiewe Dienste* 2001 (3) SA 472 (SCA) par [14]. Compare the minority judgment of Madala J in *Bel Porto School Governing Body v Premier of the Western Cape* 2002 (3) SA 265 (CC) par [207].

46 Which means that the beneficiary has no more than an expectation to be heard before a detrimental decision is taken.

47 See the discussion by Hoexter *Administrative Law* (2002) (fn 43 above) 217–222, who expressed the hope that comparative cases from the UK might provide support for the idea of a substantive expectation. The uncertainty about the notion of a substantive expectation was perpetuated in a decision of the Constitutional Court: *Bel Porto School Governing Body v Premier of the Western Cape* 2002 (3) SA 265 (CC) par [98]. In a minority judgment (par [209]–[212]), Madala J accepted the notion of a substantive expectation, and in another minority judgment (par [153]), Mokgoro and Sachs JJ also emphasised the need to consider both procedural and substantive fairness in administrative review, but the majority (per Chaskalson CJ) held that ‘the foundation for such a claim had not been laid’ in the case and that it therefore did not have to be considered. As Hoexter *Administrative Law* (2002) (fn 43 above) 222 indicates, the Natal High Court also rejected the idea in *Durban Add-Ventures Ltd v Premier, KwaZulu-Natal* (no 2) 2001 (1) SA 389 (N), and the Constitutional Court allowed two earlier opportunities to accept the idea to go by undecided: *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC); *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC).

48 In current South African law, both s 33 of the 1996 Constitution and the definition clause in s 1 of the Promotion of Administrative Justice Act 3 of 2000 refer simply to ‘rights’, but s 3 of the Act (entitled ‘Procedurally fair administrative action affecting any person’) provides that ‘(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair’, thereby incorporating the effect of the doctrine of legitimate expectation in the new statutory framework. For commentary on the similarities and differences between the common law doctrine and the statutory provision see Hoexter *Administrative Law* (2002) (fn 43 above) 215, 236. On the effect of Act 3 of 2000 on social grants, see the

The doctrine of legitimate expectation is significant for this essay because it extends the right to a fair hearing to gratuities that are otherwise unprotected against regulation, and this extension can protect rights and interests in welfare benefits granted by the state in the sense that persons with an interest in welfare grants are at least entitled to a fair hearing before their interests are affected detrimentally by administrative action.⁴⁹ However, the criticism that Verkuil raised against Reich's new property theory, namely that its beneficial effects are limited to people who are already in a relatively beneficial position,⁵⁰ applies to the doctrine of legitimate expectation as well – this doctrine cannot extend its protection outside of the relatively privileged circle of those who already enjoy (possibly weak) benefits authorised by welfare legislation. Without enabling legislation that already provides for the acquisition of social and economic entitlements, there will be little or no opportunity for protecting those entitlements on the basis of the doctrine of legitimate expectation. Depending on the attitude of the courts, the doctrine of legitimate expectation may even protect first-time applicants for welfare benefits that have not been granted yet,⁵¹ but even then its protection does not extend beyond a right to a fair hearing before the detrimental decision is taken – as long as the detrimental action follows fair procedures, the applicants are not protected against regulation.⁵²

exhaustive analysis of N de Villiers 'Social Grants and the Promotion of Administrative Justice Act' (2002) 18 *SAJHR* 321–349. De Villiers analyses the effect of the Act on both deprivation and determination issues (see fn 50 below) and on other aspects of the administrative process, such as internal appeals.

- 49 The right to a fair hearing is guaranteed in s 3 of the Promotion of Administrative Justice Act 3 of 2000, entitled 'Procedurally fair administrative action affecting any person'. The section makes provision for compulsory (e.g. notice of the decision) and discretionary (e.g. legal representation) aspects as part of the right to a fair hearing, as well as for departures from the prescriptive and discretionary provisions of the section.
- 50 See fn 37 above and surrounding text.
- 51 E Mureinik 'Reconsidering Review: Participation and Accountability' in TW Bennett et al (eds) *Administrative Law Reform* (1993) 35–46 distinguished between deprivation and determination in establishing whether the detrimental effect of an administrative decision should necessitate procedural fairness in cases where existing rights are affected only, or also in cases where persons are in the process of acquiring or applying for rights. See Hoexter *Administrative Law* (2002) (fn 43 above) 212–214 for a brief explanation and references to cases. Three cases illustrate the difference between deprivation of existing interests and determination of new interests in welfare benefits that have not been granted yet. In *Nguzu v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 601 (ECD) (confirmed by the Supreme Court of Appeal, see 2001 (4) SA 1184 (SCA)), applicants for welfare benefits were allowed to make use of the now constitutionally sanctioned (s 38 of the Constitution) possibility of a class action to sue the provincial department of welfare for allegedly unlawful cancellation of welfare benefits. In *Mahabehlala v MEC for Welfare, Eastern Cape* 2002 (1) SA 341 (SEC) and *Mbanga v MEC for Welfare, Eastern Cape* 2002 (1) SA 359 (SEC) the High Court decided that applicants for welfare benefits whose applications have not been dealt with within a reasonable time could recover payment of benefits for the period of the delay as well as interest, without having to sue on the basis of common law delict.
- 52 In *Bel Porto School Governing Body v Premier of the Western Cape* 2002 (3) SA 265 (CC), the majority (per Chaskalson CJ par [84]–[90]) and minority (Mokgoro and Sachs JJ par [152]–[156], [161]–[166]; Madala J par [209]–[212]) judges disagreed about the possible substantive effect of the constitutional right to procedural justice. Chaskalson CJ adopted the traditional, fairly deferential low-threshold rationality approach according to which the mere fact that administrative action has unfair results is not an independent ground for review. Madala J accepted without much reasoning that (a very widely defined notion of) legitimate expectation encompasses both procedural and substantive expectations. In the most extensively set out and most closely reasoned approach of the three, Mokgoro and Sachs JJ argue that the courts 'should be slow to impose obligations upon government which will inhibit the government's ability to make and implement policy effectively' (par [154], referring to the earlier decision in *Premier, Province of Mpumalanga v Executive Committee, Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC) par [41]); that the courts should nevertheless 'ensure that the administration observes fundamental rights and acts both ethically and accountably' (par [155]); that the courts will more easily intervene the 'more limited, discrete and particular the number of persons involved [in an administrative decision], and the more serious the impact on their lives'; that the right to administrative action that is justifiable in relation to the reasons given for it incorporates the principle of proportionality between the object to be achieved and the impact or results of an action, which involves an element of substantive review above and beyond the procedural aspect (par [162]); that rationality in the sense of a rational basis for administrative action is

On the whole, the attractions of procedural fairness-based theories for purposes of this essay are restricted in much the same way as the property-based theories.

(d) *Equality-Based Theory*

Pierre de Vos's equality-based and transformation-sensitive argument in support of the judicial enforcement of social and economic rights deserves special attention in view of the inequalities inherent to and characteristic of the post-apartheid South African context.⁵³ De Vos argues that the apparently contradictory decisions of the South African Constitutional Court in *Soobramoney*⁵⁴ and *Grootboom*⁵⁵ are in fact capable of rational explanation on the basis of the facts in the two cases and the Court's

... particular understanding of the role of the Bill of Rights (particularly the equality provisions and the provisions guaranteeing social and economic rights) as a transformative document aiming at addressing the deeply entrenched social *and* economic inequality in our society.⁵⁶

If the Bill of Rights is seen as a transformative document, it makes sense to deny Mr Soobramoney's demand for expensive renal treatment under circumstances where the majority of people around him did not even enjoy access to primary health care,⁵⁷ and to declare unreasonable a state housing programme that increases the formal housing pool but effectively ignores the plight of the most vulnerable sections of society in doing so.⁵⁸ De Vos's theory is based on the premise⁵⁹ that the South African Constitution rejects the social and economic status quo as unfair, and that it presents itself as a vehicle for transformation.⁶⁰ The Constitution is seen as a transformative document in the sense that it authorises and justifies not only the protection of existing rights, but also the extension of rights to those who were previously denied them – a process described by De Vos as '... the achievement of 'real' equality in the long term'.⁶¹

a foundational aspect of the legality requirement for administrative action, but not in itself enough to render the action justifiable – for that, 'something more substantial and persuasive than mere rational connection' is required, without thereby requiring the administration to do 'what the court itself might have considered the best possible outcome if it had to make the decision. What is required is a flexible standard between the two extremes of mere rational connection and judicial assumption of executive powers.' (par [164]).

53 P de Vos 'Grootboom, The Right of Access to Housing and Substantive Equality as Contextual Fairness' (2001) 17 *SAJHR* 258–276. See further De Vos (1997) 13 *SAJHR* 67–101 (fn 3 above); 'A Bridge too Far? History as Context in the Interpretation of the South African Constitution' (2001) 17 *SAJHR* 1–33.

54 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (claim for medical treatment under s 26 of the Constitution denied to person requiring renal dialysis, state policy for availability of scarce resources held to be rational and valid).

55 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (claim for provision of state housing not adjudicated, but state housing policy declared unreasonable for not making provision for emergency housing needs); see fn 1 above.

56 De Vos (2001) 17 *SAJHR* 258–276 (fn 52 above) 259 (emphasis in the original).

57 The ratio in *Soobramoney*, according to De Vos's reading. Another interpretation would be that the Court simply applied rationality review in *Soobramoney* but used the explicit requirement of reasonableness in *Grootboom* to justify stricter review. See further in the same vein Chaskalson CJ in *Bel Porto* (fn 51 above) at par [46].

58 The ratio in *Grootboom* par [95].

59 Adopted from Klare (1998) 14 *SAJHR* 146–188 (fn 9 above).

60 The Constitutional Court subscribes to this view of the importance of transformation as a point of departure; see fn 1 above and the quotation from *Grootboom* in the text preceding fn 1, as well as *Bel Porto* (fn 51 above).

61 De Vos (2001) 17 *SAJHR* 258–276 (fn 52 above) 262, with reference to s 9(2) of the 1996 Constitution.

From this premise, De Vos argues that the right to equality and the social and economic rights are closely related, in that they seek to achieve '... a specific contextual form of equality as the realisation of particular social and economic rights'.⁶² The two sets of rights, in De Vos's view, are two sides of the same coin:

It implies that any interpretation of the scope and content of social and economic rights must be undertaken with reference to how they relate to other rights in the Bill of Rights, most notably the right to equality. To put it more forcefully: it would be difficult to come to grips with the nature of the obligations imposed by social and economic rights without a solid understanding of the way in which the Constitutional Court has developed the concept of substantive equality. At the heart of this approach is an understanding that the right to equality – and the concomitant interlinking value of human dignity – and the social and economic rights are two sides of the same coin. Both sets of rights have been included in the Bill of Rights to ensure the achievement of the same objective, namely the creation of a society in which all people can achieve their full potential as human beings, despite apparent differences created by race, gender, disability and sexual orientation, and despite differences in the social and economic status of such individuals.⁶³

The concept of substantive equality as contextual fairness, as developed by the South African Constitutional Court, implies that equality is approached from a transformation-oriented point of departure, and that the impact of specific acts or omissions on the side of the state has to be gauged when determining their fairness and justifiability. De Vos argues that the same holds for social and economic rights, and that positive, corrective action may well be required in addition to traditional negative protection, because the justifiability of the state's actions can only be judged with reference to the impact it has – the impact of state action on individual lives is the most important consideration in evaluating that action.⁶⁴

Generally speaking, there is much in De Vos's theory to agree with – it is certainly true that the Constitution itself prescribes a transformative approach to both the equality provision and the social and economic rights, and that both sets of rights will therefore unquestionably require positive as well as negative protection. It is just as true that the two sets of rights share a certain common purpose in their orientation towards the transformation of existing social and economic wealth and power, and that sensitivity to context and consciousness of the actual impact of state action on individuals are required when interpreting and applying the two sets of provisions. One can even subscribe, without much hesitation or reservation, to De Vos's use of the notion of contextual fairness in describing the interpretation and application of both sets of rights. In a sense, this notion may come close (in the South African context) to Michelman's description (in the US context) of the overlap between equality discourse and a needs-based approach to the enforcement of social rights.⁶⁵ Furthermore, at least one of the advantages of a needs-based approach, namely that it will demand state action to alleviate poverty when an equality-based approach will excuse inaction, might be irrelevant or less compelling in the South African context in view of the inapplicability of the state action doctrine and acceptance of the transformative nature and effect of the Constitution.⁶⁶

62 De Vos (2001) 17 *SAJHR* 258–276 (fn 52 above) 263. The Constitutional Court has confirmed the interrelatedness of constitutional rights on a number of occasions, and at 264 (and fn 27) De Vos relies on that notion for his argument.

63 De Vos (2001) 17 *SAJHR* 258–276 (fn 52 above) 265. Footnotes omitted.

64 De Vos (2001) 17 *SAJHR* 258–276 (fn 52 above) 267.

65 Michelman (1969) 83 *Harv LR* 7–59 (fn 78 below) at 18. See ffns 91–96 below and surrounding text.

66 See the previous fn above.

While recognising the value of De Vos's notion of substantive equality as fairness and the creative possibilities of his focus on transformation, it is necessary to see the shortcomings and theoretical limitations of any theoretical approach based on equality. Above all, such an approach will always be plagued by the relativity of its own notion of social justice: once social justice is equated with or measured in terms of equality, the central problem cannot be anything but relative inequality, and the ultimate goal cannot be anything but relative equality. In the absence of a qualification external to the equality-based theory, this approach renders both the starting point and the purpose of the analysis relative, in the sense that anybody whose position is relatively worse than someone else's can claim relief, and nobody's claim for relief will be satisfied unless his or her position is at least as good as everybody else's. Given social and economic realities, and taking into account the doubts about judicial activism in the enforcement of social and economic rights raised by proponents of the countermajoritarian dilemma, such relativism would clearly render the judicial position untenable and subvert the theory of social justice.

(e) Highlights

The equality argument is premised upon the assumptions that the status quo is characterised by inequality and that greater equity has to be established. This is particularly clear from De Vos's analysis of the substantive equality jurisprudence of the South African Constitutional Court and its transformative potential. However, both the property argument and the procedural fairness argument seem to rely very strongly on the existence of established rights or interests that deserve protection, which suggests that the notion of current inequity and the need for transformation do not really find expression in these arguments to any meaningful extent – on the contrary, it can be argued that these two arguments focus so strongly on preservation of the existing order of rights that they frustrate rather than promote social and economic transformation.

It is true that all three arguments – even the fundamentally preservative property and procedural justice arguments – allow for and strive for some kind of corrective action in the sense that they propagate the extension of protection to interests that do not currently enjoy (strong) recognition and protection as rights. However, even then it is only the equality argument (in De Vos's transformative reading) that really allows for the extension of rights to those who currently have nothing at all – the property and procedural fairness arguments are much more limited in that they presuppose the existence of at least some kind of weak interest or entitlement that can be strengthened. In the same spirit, and for much the same reasons, only the equality argument makes room for the notion that greater access to constitutional protection can be realised over time or progressively – both the property argument and the procedural fairness argument display the all-or-nothing, all-at-once logic of traditional, exclusionary rights-based theory.

The one characteristic shared by the rights-based theories is that they function on the assumption that protection relies on the existence of a constitutional right rather than just a political, moral or administrative gratuity. In fact, it is the very wish to construe a strong, constitutional right for the protection of social and economic interests that inspires and drives the application of these rights-based theories in the sphere of social and economic rights. The force of equality and procedural justice arguments in the effort to find or construe a strong constitutional right to support judicial enforcement of characteristically weak socio-economic

interests is illustrated by a recent decision of the South African Constitutional Court, *Bel Porto School Governing Body v Premier of the Western Cape*,⁶⁷ which concerned the constitutional validity of provincial policy with regard to special schools that provide education for children with disabilities. In the pre-Constitutional era, the (previously white but now fully integrated) applicant schools employed general assistants to help teaching staff dealing with the children's special needs. It was common cause that the whole education sector was seriously affected by inequalities resulting from the apartheid era, and that the former white schools enjoyed a relatively advantaged position as far as infrastructure, facilities and staff were concerned, while other schools were in a far worse situation. It was also accepted that the provincial education department was constitutionally obliged to adapt its policy to progressively eradicate inequalities among schools, and that the policy adopted for this purpose was generally justified and reasonable. The applicants objected to a specific aspect of the implementation of the new staffing policy, which entailed that general assistants previously employed by former white schools were not regarded or treated as state employees, and that they would have to be retrenched and replaced by assistants employed in former non-white schools and now allocated to former white schools.

The main issue was whether the policy, formulated and adopted by the provincial government in pursuance of its constitutional duty to introduce equity in the education system, was constitutionally valid. The applicants did not object to the policy as such or to the transformation-oriented aim of eradicating inequality and striving for equity, but to the way in which the rationalisation programme was to be implemented, arguing that the implementation of the policy (a) imposed an unfair burden on them⁶⁸ and (b) did not comply with the requirements of administrative justice.⁶⁹ Generally speaking, the complaint was therefore based on equality and procedural justice. The claim for substantive relief was grounded on the allegation that the applicants' rights under sections 9 (equality), 10 (dignity), 11 (life), 12 (freedom and security of the person), 26 (access to housing), 27 (access to health care), 28 (children's rights) and 33 (just administrative action) had been infringed by implementation of the policy.

Despite confusion about whose rights were actually at stake,⁷⁰ it is noteworthy that the list of rights relied upon includes procedural justice, equality, and social and economic rights (but not property). However, from the decision it appears as if the claims based on sections 10–12 and 26–28 were not persisted with, and eventually the decision was based purely on procedural justice and equality – this despite the fact that the matter could arguably be seen as a question about the enforcement of explicitly entrenched social and economic rights (education, health care, possibly state employment).⁷¹ Judging from US case law, it must have been just as viable to argue the case on the basis of sections 26, 27 or 28 rights as on the basis of section 33 and section 9 rights, but both the applicants and the Court obviously felt more at home with the latter. This proves the continued relevance of procedural justice and equality-based theories of

67 2002 3 SA 265 (CC).

68 In that they would have to retrench their own general assistants (at their own cost) to accommodate assistants employed by the provincial education department and allocated to them: *Bel Porto* (fn 66 above) par [1].

69 In that the applicants were never properly informed of the details of the rationalisation programme and its impact on them, nor were they consulted properly regarding the programme or its implementation: *Bel Porto* (fn 66 above) par [1].

70 See *Bel Porto* (fn 66 above) par [76]–[82]. The application apparently confused the rights of the schools themselves, the pupils in these schools and the general assistants whose jobs were at stake, and the majority insisted that the rights of the general assistants could not be adjudicated, as they were not before the court.

71 See the next section of the essay below for Michelman's arguments about education as one of the minimum entitlements in all four his versions of the minimum welfare thesis.

social and economic rights in a system where (at least some of) these rights are protected independently in the Constitution. The majority decision of Chaskalson CJ illustrates the tendency to ground the enforcement of social and economic rights on equality or procedural justice arguments quite vividly, even in a constitutional setting where the social and economic context and the duty to transform are taken into account clearly and with admirable sensitivity.

Applying the equality jurisprudence already developed by the Constitutional Court,⁷² the majority held that the provincial government was under a constitutional obligation to transform a grossly unequal education system, that the policy formulated for this purpose was ‘clearly rational’ in the minimal sense established by earlier Constitutional Court equality decisions,⁷³ and that there was insufficient evidence of unfair discrimination based on race or on unequal distribution of financial burdens to induce the Court to take the matter beyond rationality review. In establishing whether the impact of the policy on the applicants amounted to unfair discrimination, the Court had to take into account that the purpose of the new staffing policy was to promote equality in the sense of placing all schools on a roughly equal footing. The fact that one aspect of the complex overall policy will affect some schools more detrimentally than others does not render the whole scheme unfair, and therefore an allegation of unfair discrimination cannot be substantiated on the basis of unequal burdens placed on individual schools.⁷⁴ The applicant school can therefore not succeed with an equality-based application to review the implementation of the transformation policy, even though its effect is that individual general assistants might lose their jobs and that children in the affected schools might be upset by a change in staff. This finding can be explained with reference to the confusion about the effect of the policy on the rights of the schools, the children, and the general assistants who might lose their jobs – on the basis of the substantive equality jurisprudence developed by the Constitutional Court it seems justifiable to hold that the negative financial impact of the equalisation policy on previously advantaged schools as institutions should not be regarded as unfair discrimination, and neither the assistants nor the children were applicants in the case. The impact of the policy on the children and the general assistants was not set out clearly and strenuously enough on the basis of socio-economic arguments to affect the outcome.

In the final analysis, it is not clear whether the application would have been more successful had the attack been focused more clearly on the nature of the interests involved as social and economic rights, as this option was not explored fully. By focusing on equality, the Court was given the opportunity to cast its argument in the mould already developed in earlier equality and discrimination cases. It is true that the equality and discrimination jurisprudence of the Constitutional Court is very aware of existing structural and institutional inequality and of the need for substantive, context-sensitive transformation, as is argued so convincingly by De Vos, but even substantive, context-sensitive and transformative jurisprudence does not make adequate provision for consideration of the unique demands presented by extreme need and poverty – in a social and economic context dominated by inequity and marginalisation, the special needs of the poorest of the poor can easily disappear behind the apparent normality of the abnormal. This impression is strengthened by the way in which the majority in *Bel Porto* distinguished the decision in *Grootboom* – which does display sensitivity for the unique demands of extreme need, even within a context characterised by need – by pointing out that

⁷² *Bel Porto* (fn 66 above) par [35]–[72].

⁷³ *Bel Porto* (fn 66 above) par [41], referring to *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) par [36]: as long as there is a rational relationship between the method and the object it is irrelevant that the object could have been achieved in a different way.

⁷⁴ *Bel Porto* (fn 66 above) par [65]–[66].

the explicit requirement of 'reasonableness' that inspired the decision in *Grootboom* did not apply in *Bel Porto* (with the result that the 'normal' requirement of minimum scrutiny or rationality review could apply).⁷⁵

Eventually, both the applicants and the minority judges in *Bel Porto* apparently regarded the argument based on procedural fairness as the most promising line of attack, although this argument, if successful, would have protected the established rights and interests of affected general assistants by taking their employment history into account when implementing the rationalisation programme – nothing more.⁷⁶ In any event, the majority also dismissed this argument on the basis of minimum rationality review. According to the majority,⁷⁷ the unfair result of an administrative decision is insufficient in itself to warrant judicial review, and in this case the unfairness was not of such a degree that an inference could be drawn that the decision was defective in a way that would provide a ground for review. In the majority's view,⁷⁸ the applicants' case was not that they have not had sufficient opportunities of making representations to the education department, but that their objections have not been acceded to and acted upon, and the right to procedural fairness does not include the right to have your view accepted.

In conclusion it appears that equality and procedural fairness-based arguments are relied on to support the enforcement of social and economic rights because these arguments are so well known and established in mainstream legal thinking and in case law. However, despite their usefulness, these arguments are limited in their scope and efficacy. On the one hand, these arguments cannot extend the reach of social and economic rights, as they protect only those who have already established some interest or entitlement that qualifies for protection in terms of normal (or slightly extended) rights doctrine. On the other hand, even when these approaches do find application to a specific interest, their protection is often relative to the nature of the right or entitlement that is protected – if the interest or entitlement can be described as property (or if its infringement can be linked to inadmissible discrimination), the protection may be strong, but if the interest is described as a gratuity (and in the absence of inadmissible discrimination) the protection will be weak.

In the next section of the essay I analyse and discuss a completely different theoretical approach, which takes absence of rights and weakness rather than recognition of rights and entitlements as its point of departure. By focusing on need and lack of rights, this approach introduces a completely different perspective on the judicial enforcement of social and economic rights.

III MICHELMAN'S NEEDS-BASED THEORY

Contrapuntal: Almost any form of polyphonic music is considered counterpoint or contrapuntal in orientation and description. However, contrapuntal music uses a number of strict rules in developing the harmonies found through the addition of a second or third voice. Depending upon the century in which the music was written, contrapuntal melodies, which

⁷⁵ Per Chaskalson CJ in *Bel Porto* (fn 66 above) par [46].

⁷⁶ This would mean that the last-in-first-out policy should have been applied with due recognition for the years of service of general assistants at applicant schools, and not only with regard to general assistants employed by the education department. See the minority judgment of Mokgoro and Sachs JJ in *Bel Porto* (fn 66 above) par [189].

⁷⁷ Per Chaskalson CJ in *Bel Porto* (fn 66 above) par [86].

⁷⁸ Per Chaskalson CJ in *Bel Porto* (fn 66 above) par [103].

were also supposed to be independent melodies from the highest voice, could be written in parallels or in contrary motion, both utilizing occasional oblique motion.

All Music Guide Glossary <<http://allmusic.com/cg/amg.dll?p=amg&sql=S2352>>

(a) Background

In a number of articles and essays published during the late 1960s and the 1970s,⁷⁹ Frank Michelman worked out the thesis that a minimum of welfare benefits have to be provided to individuals by the state, as a constitutional right, on the basis of extreme need:

The argument for minimum protection as applied to specific needs and occasions must, then, depend on the proposition that justice requires *more* than a fair opportunity to realize an income which can cover these needs or insure against them – requires, to be sure, absolute insurance that they will be met when and as felt, free of any remote contingencies pertaining to effort, thrift or foresight.⁸⁰

In the first major article on the welfare thesis, Michelman describes his approach as the ‘provisional adoption, as inchoate legal doctrine, of a theory of social justice’,⁸¹ indicating his preference for a hesitant, provisional kind of analysis and argument. In subsequent articles Michelman expands on this approach by working out at least four discrete but overlapping arguments in support of the minimum welfare thesis, without presenting any one of them (or all four combined) as a complete theory that can assume the function of doctrine⁸² – the arguments present different perspectives, from different vantage points, in support of the same fundamental thesis, namely that extreme need in itself provides enough reason for the constitutionalisation of a right to receive minimum welfare support from the state. In this section of the essay I analyse and discuss the individual theoretical arguments advanced by Michelman, and in the next section I shall follow up on his notion of a hesitant, provisional, inchoate theory of social justice consisting of several discrete, overlapping and not necessarily consistent parts.

79 See FI Michelman ‘The Supreme Court 1968 Term – Foreword: On Protecting the Poor through the Fourteenth Amendment’ (1969) 83 *Harv LR* 7–59; ‘In Pursuit of Constitutional Welfare Rights: One View of Rawls’ Theory of Justice’ (1973) 121 *Univ Penn LR* 962–1019; ‘Formal and Associational Aims in Procedural Due Process’ in J Pennock (ed) *Due Process (Nomos XVIII)* (1977) 126–171; ‘Welfare Rights in a Constitutional Democracy’ (1979) 3 *Wash Univ LQ* 659–693. Another early article, ‘The Advent of a Right to Housing: A Current Appraisal’ (1970) 5 *Harv CR-CL LR* 207–226, both cuts across several of the four main arguments and extends beyond them in discussing aspects of the right to housing not directly involved in the fundamental question whether this right can be demonstrated to be a constitutionally enforceable right. For more recent additions see FI Michelman ‘The Constitution, Social Rights and Reason: A Tribute to Etienne Mureinik’ (1998) 14 *SAJHR* 499–507; (2002) 1 *Int J Const Law* (forthcoming, see fn 15 above). Of course many of Michelman’s other publications also touch upon or analyse issues around social rights, but for present purposes I will concentrate on the articles mentioned in this footnote.

80 Michelman (1969) 83 *Harv LR* 7–59 (previous fn above) at 14. Emphasis in original.

81 Michelman (1969) 83 *Harv LR* 7–59 (fn 78 above) at 10.

82 Consequently, when I refer to ‘Michelman’s theory’ this should be understood in the sense of his ‘provisional acceptance, as inchoate doctrine, of a theory’, and not as a suggestion that his theory is presented or could be read as a complete theory of doctrinal nature or aspirations. See further Michelman (1969) 83 *Harv LR* 7–59 (fn 78 above) at 10: ‘As will presently appear, I am more interested in ways of thinking about certain legal problems, and in ways of saying what the significant factors are, than I am in doctrinally formulated summaries or predictions of outcomes.’ In this essay I share that interest exactly.

For South African lawyers, it is important that the context of Michelman's theory differs from the South African context in significant respects. The US Constitution does not entrench or guarantee social and economic rights explicitly, nor is there a real possibility of constitutionalising these rights by way of constitutional amendment – in the US context, the entrenchment debate revolves around the question whether a constitutional right to minimum welfare entitlements can be construed, as a matter of constitutional interpretation, in such a manner that the courts can consider themselves bound by it and empowered to enforce the right against the state. However, in the South African context, Michelman's theory is not significant as an argument in favour of entrenching these rights in our Constitution – that was not Michelman's intention, and it is not necessary to make that argument, as social and economic rights are already guaranteed in the South African Constitution – but as a theory that can guide the justifiable and effective enforcement of these rights by the courts. In other words, I analyse Michelman's theory of minimum welfare to see whether it can assist the development of a transformative jurisprudence of social and economic rights by exposing the moral, philosophical and theoretical arguments that support the judicial power to enforce these rights against the state.

In the following brief analytical overview of the minimum welfare thesis I refer to the four arguments developed by Michelman as the jurisprudential argument,⁸³ the moral argument,⁸⁴ the procedural fairness argument,⁸⁵ and the interpretivist argument⁸⁶ respectively.

(b) The Jurisprudential Argument

The jurisprudential argument is based on Michelman's critical analysis of US Supreme Court case law in the 1960s.⁸⁷ During this period welfare rights were protected in a series of cases⁸⁸ which were either explicitly decided or subsequently explained⁸⁹ on the basis of equality – in

83 Referring to the fact that this argument is based on analysis and critique of existing case law on welfare benefits: Michelman (1969) 83 *Harv LR* 7–59 (fn 78 above). For various reasons, none of the names I use for the four arguments below is completely satisfactory, but they do have the advantage of facilitating shorthand reference to each argument.

84 Referring to the fact that this argument concentrates on moral philosophy in discussing John Rawls's *A Theory of Justice* (1971); Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above).

85 Referring to the fact that this argument is based on analysis of case law and theory concerning due process and procedural fairness in the regulation of (inter alia) welfare benefits: Michelman in *Due Process (Nomos XVIII)* (1977) 126–171 (fn 78 above).

86 Referring to the fact that this argument depends largely on the construction of an interpretivist theory of constitutional interpretation, developed in response to John Ely's 'Constitutional Interpretivism: Its Allure and Impossibility' (1978) 53 *Ind LJ* 399; 'The Supreme Court, 1977 Term – Foreword: On Discovering Fundamental Values' (1978) 92 *Harv LR* 5; 'Toward a Representation-Reinforcing Mode of Judicial Review' (1978) 37 *Md LR* 451; Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above).

87 Case law discussed in Michelman's analysis concerns voting rights, criminal procedure, and education: Michelman (1969) 83 *Harv LR* 7–59 (fn 78 above) at 24–28.

88 Michelman (1969) 83 *Harv LR* 7–59 (fn 78 above) 40ff, 47ff refers specifically to *Shapiro v Thompson* 394 US 618 (1969) (state public assistance benefits); *McInnis v Ogilvie* 394 US 322 (1969) (public school finance) from the 1969 US Supreme Court term; and further at 24ff, 25ff to *Harper v Virginia State Board of Elections* 383 US 663 (1966) (poll tax and voting rights); *Griffin v Illinois* 351 US 12 (1956); *Douglas v California* 372 US 353 (1963) (criminal procedure). These cases are also alluded to in Michelman (1970) 5 *Harv CR-CL LR* 207–226 (fn 78 above).

89 In this respect Michelman refers to Archibald Cox 'The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights' (1966) 80 *Harv LR* 91; Phillip B Kurland 'The Supreme Court,

other words, the enforcement of welfare claims were couched in terms of prevention or rectification of constitutionally objectionable unequal treatment. Michelman argues that the equality explanation of these cases is significant: if poverty is associated with inequality, it means that unequal treatment (rather than hardship or suffering itself) is the problem to be addressed, and then ‘the ultimate goal would be an end to significant inequality’.⁹⁰ In response to the equality explanation of these cases, Michelman argues that poverty can be seen as consisting of absolute rather than relative deprivations,⁹¹ with the implication that poverty is not equated with the general inequality gap, but with absolute need or deprivation that is recognised on its own terms, irrespective of inequality. In that case, the problem to be addressed is the deprivations that constitute poverty, and not the inequality that accompanies it. Michelman sets out to show that decisions associated with the US Supreme Court’s concern for equality can also be explained with reference to what he terms ‘minimum welfare’:

Yet I hope to make clear that in many instances their purposes could be more soundly and satisfyingly understood as vindication of a state’s duty to protect against certain hazards which are endemic in an unequal society, rather than vindication of a duty to avoid complicity in unequal treatment.⁹²

Explaining the constitutionalisation of social and economic rights with reference to a theory of minimum welfare rather than with reference to equality has at least three benefits:⁹³

- (i) entitlements based on equality are unlimited unless everybody is placed in identical positions, while entitlements based on need are limited by the satisfaction of a determinable standard;
- (ii) in US equality jurisprudence, discrimination can only be present if there is state action, so that state inaction in the face of extreme poverty and need is an excuse in equality theories, whereas it is a reproach in a needs-based theory; and
- (iii) in a needs-based theory, the role of the courts is restricted to the manageable task of ‘the treatment of quasi-symptomatic, specific and severe deprivations’, instead of having to try and close the inequality gap from the bench.

In somewhat different terms, the benefits of the needs-based theory of minimum entitlements (compared to an equality-based theory) is that the former

- (i) reduces the adjudication of socio-economic participation claims against state wealth to a manageable and justiciable standard of immediate individual need;⁹⁴

1963 Term, Foreword: “Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government” (1964) 78 *Harv LR* 143.

90 Michelman (1969) 83 *Harv LR* 7–59 (fn 78 above) at 7 (referring to GS Goodpaster ‘An Introduction to the Community Development Corporation’ (1969) 46 *J Urban Law* 603 at 626) and at 8.

91 Michelman (1969) 83 *Harv LR* 7–59 (fn 78 above) at 8.

92 Michelman (1969) 83 *Harv LR* 7–59 (fn 78 above) at 9. Emphasised in the original. WH Simon ‘Rights and Redistribution in the Welfare System’ (1986) 38 *Stan LR* 1431–1516 at 1489–1492 points out that a similar argument, based on a notion of minimum need, was developed by New Deal social workers and some liberal academics during the 1960s and 1970s, but with very little success in the sense of effect in the legal system.

93 Michelman (1969) 83 *Harv LR* 7–59 (fn 78 above) at 11 mentions two, but a third appears when one reads the relevant section together with the passage at the bottom of p 8.

94 Neither the claimant nor the court is burdened with judgment on the propriety and possible amendment of the ‘overall distributional configuration’ prevalent in society: Michelman (1969) 83 *Harv LR* 7–59 (fn 78 above) at 13, 14, 35. This means that the minimum protection argument is based on the proposition that justice requires more than equal opportunities and treatment – see the citation at the beginning of this section above. Importantly, this distinguishes the minimum welfare argument from arguments based on distributive justice (although the two modes of argument can and obviously do overlap in certain areas). At 14–15, Michelman argues that, from a minimum

- (ii) avoids the pitfalls of the state action doctrine in not allowing the state to avoid its responsibilities through inaction,⁹⁵ and
- (iii) reduces concerns about judicial activism and the countermajoritarian dilemma.⁹⁶

Michelman does not ignore the importance of equality in addressing the poverty issue – he recognises that equality claims and minimum protection claims overlap, that the two approaches may often result in practically similar outcomes, and that the existence of inequality may be an important indication of a failure to provide the required minimum.⁹⁷ The advantage of minimum protection thinking is that it highlights the importance of the judicial role in adjudicating welfare claims, but this advantage ‘remains utterly theoretical until (if ever) we can develop a ‘justiciable’ standard for specifying the acceptable minimum and the acceptable gap.’⁹⁸ Notions of equality may be required to define a grievance based on minimum protection, and may also assist in fashioning a remedy in a specific case, but even when results tend to be similar, minimum protection thinking still has the advantage of opening up distinct and useful ways of arguing about the provision of minimum protection for immediate individual needs in individual cases.⁹⁹ Michelman’s jurisprudential argument brings immediacy and urgency to the debate and illustrates the fact that social justice cannot and should not be considered purely in terms of the autonomy of various state organs or the acquired, vested and recognised rights of welfare candidates – considerations of individual need and suffering inevitably require value judgments based on morality.

(c) The Moral Argument

According to the moral argument for minimum welfare, morality and justice demand that certain basic social and economic needs should be satisfied by the state.¹⁰⁰ Michelman develops the argument in the course of a review of John Rawls’s *A Theory of Justice*,¹⁰¹ by way of the following question:

protection point of view, social institutions and practices will not satisfy Rawls’s idea of justice as fairness unless they provide insurance against the risk of relatively grave need with relatively little damage to efficiency and incentives.’

- 95 ‘Minimum protection is likely to demand correction of certain practices or conditions which equal protection would tolerate’ – Michelman (1969) 83 *Harv LR* 7–59 (fn 78 above) at 39 (emphasis in original).
- 96 An important aspect of the minimum welfare thesis is that it ‘is likely to demand remedies which cannot be directly embodied in judicial decrees’: Michelman (1969) 83 *Harv LR* 7–59 (fn 78 above) at 39 (emphasis in original), thereby reducing the need for judicial activism (in addition to the fact that the theory already reduces that need because it does not require judicial intervention in the general inequality of wealth, but merely in individual cases of extreme need).
- 97 Michelman (1969) 83 *Harv LR* 7–59 (fn 78 above) at 18.
- 98 Michelman (1969) 83 *Harv LR* 7–59 (fn 78 above) at 57.
- 99 Michelman (1969) 83 *Harv LR* 7–59 (fn 78 above) at 57–58.
- 100 See Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above). The moral argument bears a special relationship to the others: Michelman (1970) 5 *Harv CR-CL LR* 207–226 (fn 78 above) at 208–209 suggests that it would be difficult to construe a legal theoretical argument in support of constitutional welfare-type rights in the absence of a suitable supporting theory of ethical or moral philosophy. Michelman (2002) 1 *Int J Const Law* (forthcoming, fn 15 above) argues that one would not support the constitutionalisation of minimum welfare rights unless one subscribed, at least provisionally, to a moral or philosophical principle in terms of which claims for minimum welfare support are inextricably linked to the legitimacy of political society.
- 101 (1971). Michelman (1970) 5 *Harv CR-CL LR* 207–226 (fn 78 above) at 209 fn 2 refers to Rawls’s work in developing a moral or ethical background argument for minimum welfare as ‘tentative and general, suggesting no very rigorous approaches to defining the minimum or specifying its contents’.

How does the book bear upon the work of legal investigators concerned or curious about recognition, through legal processes, of claimed affirmative rights (let us call them ‘welfare rights’) to education, shelter, subsistence, health care and the like, or to the money these things cost?¹⁰²

In its concern with distributive justice and with claims to material social goods, Rawls’s book represents a significant departure from mainstream legal tradition, which traditionally functions in

... a paradigm of legal order which is noticeably lacking in norms, principles, and categories of analysis directly applicable to the evaluation of distributional outcomes. The notion of justice inhabiting that paradigm has been essentially corrective and regulative, stabilizing and preservative – if not of any extant distributional configuration, then of an extant framework of procedures and practices within which distributions are secreted.¹⁰³

Rawls argues that outcome-oriented notions of distributive justice find support in our moral capacity or sense of justice, which contradicts the traditionally popular view that, in the absence of knowable or consensual substantive principles of distributive justice, the law should concern itself solely with procedural justice. The resulting moral theory could potentially support or explain the constitutionalisation of specific minimum welfare guaranties¹⁰⁴ for the provision of needs such as shelter, education and medical care.¹⁰⁵

Michelman structures his analysis of Rawls’s book by way of three questions, the first two of which involve subquestions:

- (i) whether and to what extent Rawls’s ideal theory suggests judicially enforceable welfare rights, whether US society satisfies Rawls’s definition of a well-ordered society, and what follows if it does not;¹⁰⁶
- (ii) whether the principles of justice have a substantive content, which points to welfare rights and, if they do, what specific form these rights might assume; whether the theory requires or justifies that these rights be included in a written constitution; and whether the rights would be enforceable by judicial review if the legislature fails to realise them;¹⁰⁷ and
- (iii) whether a theory of justice that supports welfare entitlements has or can have any force in constitutional adjudication.¹⁰⁸

On Michelman’s reading of ideal theory, Rawls’s difference principle¹⁰⁹ does imply something like a constitutional insurance right for basic needs, but ‘it is a (less justiciable) income right

102 Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 962.

103 Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 963.

104 In this context, Michelman also refers to them as insurance rights.

105 Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 966.

106 The significant point in this part of Michelman’s analysis is that ‘a theory which suggests justiciable welfare rights for a society which is well-ordered might lead to different conclusions for one which is not. Conversely, and perhaps more important, it may turn out that even if the theory does not indicate justiciable welfare rights under ideal conditions, it suggest them as a way of coping with nonideal conditions’: Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 967–968. This aspect is discussed again later in the essay below.

107 Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 968.

108 Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 968.

109 ‘Within the general framework of a free-market system, the difference principle is said to imply a claim on behalf of each person to a “social minimum” which must be provided in order that the residual market determination of distributive shares may be considered just’: Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 976.

rather than a (more justiciable) set of insurance rights'.¹¹⁰ An alternative solution based on the difference principle, namely to maximise the primary good of self-respect¹¹¹ through taxation and transfer, does not result in a satisfactory justification of minimum insurance rights either,¹¹² and therefore Michelman concludes that the difference principle does not provide a basis for the construction of a theory of insurance rights. Rawls's opportunity principle,¹¹³ by contrast, does seem to require a kind of insurance right in that nobody may be precluded from education because of lack of funds, but it is unclear whether this insurance right would be justiciable.¹¹⁴ At the same time, Michelman indicates that Rawls's construction of the education requirement under the opportunity principle means that this insurance right must necessarily extend beyond educational opportunities in the strict sense,¹¹⁵ and that the additional rights entailed under the auspices of educational opportunity seem more justiciable than the education core right itself.¹¹⁶ The liberty principle¹¹⁷ also implies satisfaction of certain basic entitlement needs, and therefore seems to support the idea of justiciable insurance rights.¹¹⁸ Consequently, in ideal theory, the idea of a social minimum seems most convincing when seen as an implication of the whole theory of justice as fairness, in the sense that questions of income and wealth maximisation are not open for discussion or decision until provision for 'a package of basic welfare needs', for that which 'one specifically needs in order that his basic rights, liberties and opportunities may be effectively enjoyed, and his self-respect maintained', has been secured first:

Thus the difference principle implies welfare rights in the elusive form of whatever is necessary to prevent the undermining of self-respect by relative deprivation. The opportunity and liberty principles imply welfare rights as more objective, less relativistic biological entailments of opportunity and liberty. In addition, the central and preeminent good of self-respect may imply welfare rights reaching beyond those biological entailments, and not depending on notions of relative deprivation for their justification.¹¹⁹

Michelman's second set of questions about minimum welfare or insurance rights in Rawls's theory of justice concerns the role of the judiciary: do the principles of justice have a substantive content, which points to welfare rights and, if they do, does the theory require or justify that these rights be included in a written constitution, and would the rights be enforceable by judicial review if the legislature fails to realise them? In ideal theory, a well-

110 Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 981 compares this conclusion to average utility, which allows for a minimum in terms of social insurance for basic needs, but not for translating that minimum into a constitutional right.

111 The other primary goods are income and wealth, and the difference principle demands that the bottom part of society's prospects with regard to these goods should be maximised: Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 990.

112 Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 988.

113 This principle means that social and economic inequalities will only be permissible if the social and economic positions in the system are formally open to all and fair equality of opportunity is provided, including some provision for compensatory education: Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 971.

114 Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 988.

115 Because 'education's effective biological entailments, whatever they are' need to be satisfied before education can take place in any meaningful sense; see Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 989. These 'biological entailments' would include things such as basic food and shelter and health care.

116 Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 989.

117 In terms of this primary principle the civil and political basic rights and liberties of citizens (such as education) are equal and as extensive as possible consistent with the principle of mutuality: Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 971.

118 Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 989–990.

119 Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 990.

ordered society does not rely on judicial enforcement of welfare rights,¹²⁰ but in nonideal theory, members of a society where the principles of justice are not yet generally acknowledged, or where material circumstances or political and social maturity does not yet allow for their full implementation,

... would then be seeking institutional arrangements which could realize (or improve the chances of realizing) certain rights even in the face of legislative hostility or apathy, and which also could proclaim rights and principles of justice in such a way as to advance their public acceptance.¹²¹

In a nonideal society, where material circumstances prevent the full implementation of ideal theory, people would trade off some of their liberty rights for the sake of realising and enforcing minimum welfare rights, and therefore allow judicial enforcement of minimum welfare. Recognition of substantive constitutional rights and of judicial review as a way of enforcing them may only be acceptable within strict limits,¹²² but even then Rawls's theory of justice as fairness seems to support a moral argument for judicially enforceable, substantive constitutional rights related to self-respect.¹²³ In Michelman's view, this version of the minimum welfare argument appears stronger and politically more convincing in the form of an argument in favour of insurance rights than in the form of an argument for economic opportunity and general transfer programmes; in other words, minimum welfare rather than minimum income.¹²⁴

On the basis of this moral argument, Michelman concludes that the clearest benefit of judicial review that appeals directly to principles of justice appears in societies that have reached a stage where shared senses of justice are emergent among the citizens, but not yet fully or explicitly acknowledged by the majority of them (or where material circumstances prevent or inhibit their full realisation). In these societies, judicial enforcement of minimum welfare may assume the form of a trade-off between justice in participatory rights (majoritarian rule) and justice in substantive rights (securing minimum welfare through judicial review).¹²⁵ Moreover, when social minimum rights have been established constitutionally or legislatively, the moral argument from the principles of justice¹²⁶ lends extra weight to the judicial enforcement of those rights, and supports boldness and creativity in judicial exploitation of openings and opportunities created by the legislature. This is an extremely important aspect of Michelman's analysis of the implications of Rawlsian theory for the judicial enforcement of social and economic rights: even when social and economic rights have been entrenched in a constitution or embodied in legislation, Michelman's moral argument resists a purely economic, efficiency-type interpretation of those rights, with all the implications that such an interpretation and resistance against it may have for the development of jurisprudence about the respective roles and responsibilities of the courts and the legislature in protecting and enforcing minimum welfare principles and policies.

120 Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 996–997.

121 Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 998.

122 Such as the proviso that judicial review can only vindicate welfare rights strictly associated with the basic liberties; Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 1000.

123 Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 1001.

124 Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 1002–1003.

125 Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 1010.

126 As opposed to interpretations that rely purely on efficiency and external economies: Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 1012.

(d) The Procedural Fairness Argument

The procedural fairness argument is based on Michelman's observation that due process adjudication is not restricted to the (formal)¹²⁷ protection of existing entitlements,¹²⁸ but can also involve nonformal¹²⁹ aims that may expand the notion of entitlement for due process purposes in some public welfare cases.¹³⁰

The emergence of due process in the public-housing context thus seems consistent with a general conception of due process as a device for helping to secure to individuals their private rights. Yet the ultimate perception of the right seems to be rooted in moral consciousness – in supposedly shared values – and not in positive law.¹³¹

In formal due process doctrine, judicial reliance upon the existence of entitlement triggers¹³² reflects a rights-centred or purely formal view of the aims of explanatory procedures, combined

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- 127 Michelman in *Due Process (Nomos XVIII)* (1977) 126–171 (fn 78 above) at 126–127: 'A procedure is formal insofar as it focuses on the question of legal justification – and lays the agent's decision open to reversal by an arbiter or judge in case the agent can point to no true ground which justifies the action under some legally valid precept' and further at 129 '... a procedure is formal insofar as its point of purpose is to vindicate legal entitlement, to secure to an individual that which is rightfully his'. Michelman also refers to formal procedures as 'possessory', and he describes the aims of formal and nonformal procedures as 'possessive' and 'communal', 'interpersonal' and 'privatistic', and as 'proprietary' and 'relational' respectively (at 128). The lastmentioned characterisation taps into the rich vein of meaning uncovered by the distinction between proprietary and relational approaches to or theories of private property: the proprietary or entitlement-based approach relies on the image of protecting an entitlement that has been separated out, isolated and secured against invasion, whereas the relational approach relies on the image of a group member engaging in relational discourse about entitlements or rights. With regard to this distinction see the discussion below, and compare further Michelman 'Possession vs. Distribution in the Constitutional Idea of Property' (1987) 72 *Iowa LR* 1319–1350; GS Alexander *Commodity and Propriety – Competing Visions of Property in American Legal Thought 1776–1970* (1997) 1–17.
- 128 Michelman uses the notion of formal protection of entitlements to refer to the process of what he describes as the 'isolated individual getting what is his', see Michelman in *Due Process (Nomos XVIII)* (1977) 126 at 131. In other words, formal protection in this sense refers to explanatory procedures (reasons for and justification of due process decisions) based on the vested entitlements of the affected individual.
- 129 See Michelman in *Due Process (Nomos XVIII)* (1977) 126–171 (fn 78 above) at 127: 'In a nonformal procedure, the individual questions the validity of the agent's precept (if at all) under some criterion other than legality – prudence, morality, fairness, or whatever; or he may do neither, merely hearing the agent out and accepting or concurring in the action'; and further '[Nonformal] procedures seem responsive to demands for *revelation and participation*. They attach value to the individual's *being told why* the agent is treating him unfavorably and to his *having a part in the decision*' (emphasis in original). Michelman's argument departs from the premise that explanatory procedures in due process cases can be either formal or nonformal, and proceeds to posit that nonformal procedures can serve the psychological, relational, or participatory purpose of making the person affected by administrative decision feel that he or she has played a part in or made a contribution to the decision. Michelman at 128: 'A nonformal view of an explanatory procedure would thus recognize a communal or fraternal aspect of social life of which a purely formal view, strictly concerned with ensuring that the private entitlements of individuals will be respected, may remain oblivious.' Here, Michelman links up with the Republican theme of self-government in his work, compare 'The Supreme Court, 1985 Term – Foreword: Traces of Self-Government' (1986) 1000 *Harv LR* 4–77; 'Law's Republic' (1988) 97 *Yale LJ* 1493–1537. See the discussion below.
- 130 In *Due Process (Nomos XVIII)* (1977) 126–171 (fn 78 above), Michelman contrasts due process decisions relating to state jobs (see *Board of Regents of State Colleges v Roth* 408 US 564 (1972): professorial tenure) with decisions relating to public housing (see Michelman at fn 52–54). The possibility of developing a minimum welfare theory on the basis of due process was alluded to in Michelman (1970) 5 *Harv CR-CL LR* 207–226 (fn 78 above).
- 131 Michelman in *Due Process (Nomos XVIII)* (1977) 126–171 (fn 78 above) at 144.
- 132 An entitlement trigger is applied when the courts require proof of a deprivation of entitlements such as life, liberty, or property before allowing the due process guaranty to kick in, as was the case in *Board of Regents of State Colleges v Roth* 408 US 564 (1972). See Michelman in *Due Process (Nomos XVIII)* (1977) 126–171 (fn 78 above) at 129, 131–137 for a discussion of the case law.

with a commitment to a modest judicial role in due process adjudication, which seems to be consistent with a positivist model of legal order.¹³³ However, the coherence of this rights-centred, minimalist, formal, positivist approach is undermined by empirical proof of judicial activism, in some cases, in the method of determining whether entitlements exist that can trigger the requirement of due process:¹³⁴

When intent on protecting persons against highly discretionary official interference, courts have found ways of doing so.¹³⁵

Most notably, the ‘antidiscretion strategy’ of finding an entitlement where there seems to be none allowed the courts to protect interests in state housing, even when access to housing is granted under legislation that seems clearly to preclude the vesting of entitlements – some US courts even extended this protection to the admissions stage of public housing.¹³⁶ Thus the courts held that occupants of state housing had a due process right that entitled them to indefinite occupancy, unless terminations of their occupancy could be justified by the state housing agency with reference to the occupant’s lack of need for the housing, abuse of the property or inability to pay enough to keep the project solvent.¹³⁷ In other words, the courts construed an indirect entitlement to state housing by placing due process restrictions on termination and eviction powers, despite the explicit anti-entitlement provisions of the relevant housing legislation.¹³⁸ Interestingly, though, this strategy was not allowed to protect the jobs of untenured college professors,¹³⁹ as is illustrated by *Board of Regents of State Colleges v Roth*,¹⁴⁰ where the US Supreme Court relied on the doctrine of entitlement triggers in deciding that the beneficiary of a pretenure one-year teaching contract had no entitlement, upon non-renewal of the contract, that could found a constitutional due process right to an explanatory procedure. In combination, Michelman concludes,

... the housing and public employment cases suggest this possibility: when legislation places various benefits within reach of individuals without meaning or purporting to create even the thinnest of entitlements, the courts will read the due process clauses to make entitlements out of some of these benefits though not all of them.¹⁴¹

133 Michelman in *Due Process (Nomos XVIII)* (1977) 126–171 (fn 78 above) at 138.

134 Is this Michelman in CLS mode? See the contribution of Johan van der Walt elsewhere in this volume: ‘Frankly Befriending the Fundamental Contradiction: Frank Michelman and Critical Legal Theory’.

135 Michelman in *Due Process (Nomos XVIII)* (1977) 126–171 (fn 78 above) at 138.

136 Michelman in *Due Process (Nomos XVIII)* (1977) 126–171 (fn 78 above) at 140–141 ff. 52–54. Compare the overview of procedural fairness-based theory above, and particularly the distinction (coined by Mureinik) between determination and deprivation issues: see fn 50 above.

137 Michelman in *Due Process (Nomos XVIII)* (1977) 126–171 (fn 78 above) at 140, with reference to case law in ff. 52–53.

138 For comparable examples from squatting law in South Africa, The Netherlands and Germany see AJ van der Walt ‘De Onrechtmatige Bezetting van Leegstaande Woningen en het Eigendomsbegrip. Een Vergelijkende Analyse van het Conflict tussen de Privaat Eigendom van Onroerende Goed en Dakloosheid’ (Unlawful occupation of unoccupied houses and the property concept. A comparative analysis of the conflict between private ownership of immovable property and homelessness) (1991) 17 *Recht & Kritiek* 329–359 (comparative analysis of examples from Dutch, German and South African law where policy-inspired or due process-inspired restrictions on eviction of unlawful occupiers may be construed as the judicial creation of occupation entitlements, despite clear statutory and/or common law provisions that render the occupancy illegal or unlawful).

139 Michelman in *Due Process (Nomos XVIII)* (1977) 126–171 (fn 78 above) at 151–152 indicates that a case can be made for distinguishing, on the basis of a hypothetical provision in public employment legislation and within the framework of the doctrine of entitlement triggers, between tenured and untenured teachers on similar grounds.

140 408 US 564 (1972).

141 Michelman in *Due Process (Nomos XVIII)* (1977) 126–171 (fn 78 above) at 141.

Michelman interprets this development as an interesting 'resuscitation' of the rights-privilege distinction¹⁴² in terms of which both categories end up on the public-sector side of the original distinction,¹⁴³ but public housing is seen and treated as a right that is protected by substantive and procedural due process, while public employment remains a bare privilege.¹⁴⁴ Michelman argues that this apparent paradox or inconsistency in due process case law could be explained with reference to our intuition about something distinctive in the very nature of the need for adequate housing:

Perhaps it is this intuition which makes us feel that all precepts for assigning housing billets are inapposite except precepts of relative need so simple and straightforward that they can frame a formal entitlement.¹⁴⁵

In other words, the discrepancy in due process case law could appear reasonable if understood on the basis of a moral intuition that tells us there must be something like 'a legally inchoate entitlement to be adequately housed', an intuition that makes us experience housing claims as moral claims and treat them differently from other due process claims such as public employment.¹⁴⁶ This moral entitlement may or may not be supported by the belief that self-respect is and ought to be nurtured through the provision of material goods.¹⁴⁷

It is noteworthy that Michelman's procedural fairness argument goes much further than the traditional or purely formal procedural fairness argument, even in the supposedly context-sensitive, transformation-driven South African version of this argument as it was interpreted and applied by the majority in *Bel Porto*,¹⁴⁸ in giving special meaning to the right to procedural fairness in the context of social and economic rights, because of the special importance that attaches to basic social goods such as housing in Michelman's needs-driven theory of minimum welfare.

(e) The Interpretivist Argument

The interpretivist argument supports the welfare thesis with an appeal to the pervasive constitutional value of effective participation in a representative democracy, on the assumption that such participation is impossible in the absence of certain basic material requirements:

142 In terms of which rights are protected and privileges not. This distinction was rejected by the US Supreme Court (*Board of Regents of State Colleges v Roth* 408 US 564 (1972) at 571; compare W van Alstyne 'The Demise of the Right-Privilege Distinction' (1968) 81 *Harv LR* 1439, cited by Michelman in *Due Process (Nomos XVIII)* (1977) 126–171 (fn 78 above) at fn 58). Michelman also refers to the position established in *Goldberg v Kelly* 397 US 254 (1970) that benefits under statutory welfare programmes are rights rather than benefits, and to the erosion of that position in subsequent cases, see further B Brudno 'Fairness and Bureaucracy: The Demise of Procedural Due Process for Welfare Claimants' (1974) 25 *Hastings LJ* 813.

143 In the original distinction, 'private' rights were secured against state regulation once vested, while 'public' privileges were not; see the previous fn above.

144 Michelman in *Due Process (Nomos XVIII)* (1977) 126–171 (fn 78 above) at 141–142.

145 Michelman in *Due Process (Nomos XVIII)* (1977) 126–171 (fn 78 above) at 143.

146 Michelman in *Due Process (Nomos XVIII)* (1977) 126–171 (fn 78 above) at 143–145. A perhaps somewhat more cynical explanation (at 151) is that a right to public housing fits the aesthetic of property rights – which do qualify as entitlements in the formal approach – more easily, in the sense that the claim to be provided with or to retain housing is more easily seen and treated as a right to the housing, rather as a claim to specific action or behaviour by the official. Public employment is much more difficult to cast into the property mould, as appears from Reich's analysis (see fn 16–15 above and surrounding text).

147 Michelman in *Due Process (Nomos XVIII)* (1977) 126–171 (fn 78 above) at 151.

148 Fn 66 above.

To be hungry, afflicted, ill-educated, enervated, and demoralized by one's material circumstances of life is not only to be personally disadvantaged in competitive politics, but also, quite possibly, to be identified as a member of a group – call it 'the poor' – that has both some characteristic political aims and values and some vulnerability to having its natural force of numbers systematically subordinated in the processes of political influence and coalition-building.¹⁴⁹

In response to objections against his earlier explanations of the welfare thesis,¹⁵⁰ Michelman developed a two-pronged argument. Firstly, he argues, with reference to a series of US Supreme Court decisions between 1969 and 1974,¹⁵¹ that existing cases do not establish the welfare thesis,¹⁵² but they go a long way to answer the objections that it is fanciful and that it forces the courts to usurp legislative and executive tasks.¹⁵³ Michelman therefore insists that the cases do suggest the existence of a constitutional welfare right that can be enforced judicially without getting bogged down in unjusticiable standards or usurping legislative and executive functions.

Secondly, Michelman counters the objection that the welfare thesis has no basis in legally admissible sources or methods by showing how constitutional welfare rights can be construed in an interpretivist argument,¹⁵⁴ that is, in an argument grounded in a relatively conservative,

149 Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above) at 678. This argument was echoed and supported by AR Amar 'Forty Acres and a Mule: A Republican Theory of Minimal Entitlements' (1990) 13 *Harv J Law & Public Pol* 37–43.

150 Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above). The objections were that (a) the concept of welfare rights is fanciful and uncorroborated by legal texts or decisions (RA Posner *Economic Analysis of the Law* (2nd ed 1977) 503–504), (b) the notion is ill-conceived because there is no justiciable standard to determine when the rights are satisfied, and that the courts cannot presume to define or enforce these rights without usurping legislative and executive roles (GE Frug 'The Judicial Power of the Purse' (1978) 126 *U Pa LR* 715; HP Monaghan 'The Constitution Goes to Harvard' (1978) *Harv CR-CL LR* 117; Ralph K Winter 'Poverty, Economic Equality, and the Equal Protection Clause' 1972 *Sup Ct Rev* 41); (c) judicial vindication of these rights would be illegitimate and undemocratic (Monaghan and Winter); (d) that the claim of rights is not in the interests of the supposed beneficiaries (Winter); and (e) that the claim is immoral because it attacks the basic liberties of those who would have to satisfy them (Winter; C Fried *Right and Wrong* (1978) chaps 5–6).

151 See Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above) at 661 ff 10–16. The cases are *Shapiro v Thompson* 394 US 618 (1969); *Starns v Malkerson* 326 F Supp 234 (D Minn 1970), *aff'd* 401 US 985 (1971); *United States Department of Agriculture v Moreno* 413 US 528 (1973); *Village of Belle Terre v Boraas* 416 US 1 (1974); *Goldberg v Kelly* 397 US 254 (1970); *Arnett v Kennedy* 416 US 134 (1974); some of which were analysed in Michelman's earlier articles.

152 Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above) at 663–664: the welfare thesis cannot be established by purely empirical analysis of the case law, because a number of decisions over the same period contradict the thesis by their rhetoric and their results, and even when the courts upheld welfare rights they did so on other grounds such as equality. Although many of the contradictory decisions can be explained away and the alternative grounds for supporting decisions can be shown to be unsatisfactory, '[t]hese explanations and showings are too laborious to support a claim that the cases themselves fully make out the existence of any constitutional welfare rights. Still, the cases suggest such rights' (at 664).

153 Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above) at 663–664: although the cases themselves do not fully and unambiguously demonstrate the welfare thesis, they do suggest the existence of constitutional welfare rights. Moreover, the cases show that and how the courts can reach decisions on the basis of the welfare thesis without assuming impossible or inappropriate tasks such as deciding on unjusticiable standards or usurping legislative and executive functions.

154 Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above) at 665 uses the term 'interpretivist' in the sense made current by Ely and Grey: an interpretivist argument ties its premises into the text of the Constitution, or 'into the documentary Constitution', although it needn't be literalist.

restrained theory of constitutional interpretation such as was developed by John Ely.¹⁵⁵ According to this interpretivist approach, constitutional interpretation has to proceed from premises that are in the US Constitution itself, but at the same time we must accept that the US Constitution includes certain provisions that contain an irresistible invitation to look beyond the Constitution.¹⁵⁶ In response to the apparent paradox exposed by his analysis,¹⁵⁷ Ely introduced the notion of representation-reinforcement as a pervasive constitutional value that can guide interpretivism.¹⁵⁸ Michelman explains:¹⁵⁹

The contradiction cannot be denied, but perhaps it can be superseded by moving to a yet more abstract plane of constitutional interpretation, which takes as its premise an implicit value or purpose thought to underlie and pervade the whole constitutional scheme – that of political participation through representation.

Representation reinforcement, as a principle of constitutional interpretation, implies that judges are empowered and constrained, in supplying content to open-ended guaranties in the Constitution, by the question whether state conduct unduly restricts the opportunity to participate in political processes or in the outcomes reached by them.¹⁶⁰ The underlying premise is that a person cannot function properly in a representative democracy when deprived of certain interests held simply by virtue of being a person in a republican polity, and therefore assuring broad participation in those interests will be representation reinforcing in Ely's sense.¹⁶¹ Sharp differences in economic and social status and power require that the constitutional value of majority rule be prevented from lapsing into majority tyranny through systematic disregard for the interests of easily identified and well-defined minorities, particularly minorities consisting of groups of people too weak, stigmatised or ill-supplied to ensure effective participation in the 'give-and-take of pluralistic majoritarian politics'.¹⁶²

When developing his theory of representation-reinforcing interpretivism, Ely was explaining the protection of voting rights and racial discrimination in the Warren Court decisions, but Michelman 'hitches [his] wagon to Ely's star'¹⁶³ to argue that minimum welfare rights should be included in

155 Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above) at 664–666, 666 at fn 34: Ely's theory of constitutional interpretation was set out in three articles: Ely (1978) *Ind LJ* 399; (1978) 92 *Harv LR* 5; and (1978) 37 *Md LR* 451 (all fn 72 above).

156 Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above) at 666–667, citing Ely (1978) *Ind LJ* 399 (fn 72 above) at 413. Ely structures his argument around three provisions in the US Constitution (the Ninth Amendment and the privileges-or-immunities and equal-protection clauses in the Fourteenth Amendment), and concludes that each of these provisions contains irresistible indications of the existence of rights and entitlements beyond those enumerated in the text of the Constitution.

157 The paradox is that judges are 'left immobilized between two faces of interpretivist methodology – between the demand for judicial abstinence from extra-constitutional dictation of values to the political branches and the demand for loyalty to the explicit constitutional text, including its apparent mandate upon the government to respect certain values or interests left for future definition': Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above) at 669.

158 The notion was developed in Ely (1978) 37 *Md LR* 451 (fn 72 above).

159 Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above) at 669.

160 Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above) at 670 notes the importance, for his own reliance on interpretivist theory, of the fact that Ely's theory highlights 'the Constitution's pervasive purpose of ensuring participation not only in procedures, but in outcomes; not only in "the political process", but in the "benefits" and "accommodations" the process yields'.

161 Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above) at 670.

162 Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above) at 672–673.

163 Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above) at 674 summarises the Ely position thus: 'the Constitution itself commands recognition of transtextual rights not only by the political branches in the first

... those transtextual rights that ought to be judicially recognized as representation-reinforcing privileges or immunities, or as the negatives of representation-defeating inequalities ...¹⁶⁴

On this basis the US Supreme Court came close to recognising that ‘some identifiable quantum of basic education’ may be a constitutional right,¹⁶⁵ and Michelman argues that ‘life itself, health and vigor, presentable attire, or shelter not only from the elements but from the physical and psychological onslaughts of social debilitation’ could and should also be regarded as

... the universal, rock-bottom prerequisites of effective participation in democratic representation – even paramount in importance to education and, certainly, to the niceties of apportionment, districting, and ballot access on which so much judicial and scholarly labor has been lavished ...¹⁶⁶

Michelman notes that positive rights are not unknown to American lawyers, who recognise such rights and expect to have them enforced when specifically and deliberately created in contracts, legislation, and the Constitution. What worries lawyers about positive rights in other contexts is that they are non-reciprocal and potentially boundless, which conflicts with traditional notions of what rights are and how they are enforced.¹⁶⁷ These objections fade away when positive, minimum welfare rights are demonstrated to be political rights, as Michelman attempts to do on the basis of Ely’s theory of representation reinforcement:¹⁶⁸

It is a virtue of Ely’s reading of the Constitution that it forces us to consider seriously whether our commitment to a certain institutional system – that of majoritarian republicanism or representative democracy – does not also commit us to a recognition of an exceptional class of positive rights and, to that extent, to a recognition of the state which that system constitutes as a bearer of affirmative duties.

[...]

It seems to be a condition of the system’s own legitimacy and, therefore, a duty of the system and its beneficiaries that it be insured against bias arising out of the existence or distribution of unmet needs. The precise content of that duty will vary with historical circumstance, which is a good reason why the duty and its correlative rights should be among those whose definition is always left as ‘a delegation to future constitutional decision makers.’¹⁶⁹

instance, but also (as usual) by the judiciary in case of legislative or executive default, provided only that a “principled ... approach to judicial enforcement” can be found, one not “hopelessly inconsistent with our nation’s commitment to representative democracy” as directly expressed by the Constitution as a whole. One seeks, then, a limiting and constraining criterion – a premise for argument aimed at distinguishing between false and true transtextual claims – that is itself rooted in the animating constitutional idea of representative democracy. “Representation-reinforcement” or “broad participation” is just such a criterion. *Ergo*, the judiciary must recognize and enforce rights singled out on the basis of that criterion. So argues Ely.’

164 Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above) at 676.

165 Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above) at 677, with reference to *San Antonio Independent School District v Rodriguez* 411 US 1 (1973) at 36.

166 Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above) at 677, with reference to Dixon *Democratic Representation: Reapportionment in Law and Politics* (1968) on the one hand and to *Maher v Roe* 432 US 464 (1977) (obiter at 469 that there is no constitutional right to health care) on the other.

167 Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above) at 681.

168 Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above) at 684 notes that he has made a similar argument, with reference to Rawls’s theory of justice as fairness, in Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above), see the discussion above.

169 Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above) at 684, with reference to Ely (1978) *Ind LJ* 399 (fn 72 above), fn omitted.

This explanation of the representation-reinforcement argument makes it clear that the constitutionally guaranteed welfare minimum is essentially a political right, in the sense that its justification is inextricably linked with the legitimacy of the political system of participatory democracy. In a more recent publication, Michelman describes this as a 'constitutional-contractarian' argument in support of social rights:

It may well seem that we cannot reasonably call on everyone, as reasonable but also as rational, to submit their fates to the tender mercies of a democratic-majoritarian lawmaking system, without also committing our society, from the start, to run itself in ways designed to constitute and sustain every person as a competent and respected contributor to political exchange and contestation and furthermore to social and economic life. If so, it seems that social rights guarantees of some kind must compose an essential part of the liberal-democratic constitutional contract.¹⁷⁰

(f) Highlights

It was said earlier that Michelman does not present the four arguments above – separately or combined – as a complete theory of social justice, but the coherence of his four overlapping perspectives is nevertheless noticeable. Without going into an exhaustive analysis or critique of the various arguments, I wish to highlight the following aspects of the theory of justice that either underlies or can be construed upon the basis of these arguments.

Firstly, it is significant that absolute, individual need forms the theoretical core of each argument, with the result that the minimum welfare theory adopts the transformative assumption that social justice is not inherent in the present system and that it needs to be established through change and reform. Moreover, instead of adopting an aspect of the social or legal system (such as equality) as his point of departure, Michelman opts for the pragmatist approach and starts from within the problem itself.¹⁷¹ the problem to address is not a general institutional shortcoming, but actual, embodied, individual poverty, need and suffering, weakness, marginality. This approach reduces the importance of institutional or systemic considerations and increases the importance of individuality and immediacy, which in turns renders a turn to moral judgment inevitable. As a result, each of Michelman's discrete arguments relies on moral judgment about the concrete, embodied plight or suffering of individual people. An important rhetorical and theoretical implication of this approach is that it turns the traditional theoretical strategy of rights-based theories on its head by concentrating not on legal power, but on individual need, marginality, weakness and powerlessness. The constitutional guarantee is not based on what one has, but on what one lacks and needs, what makes one weak. In the process, Michelman implicitly rejects the traditional theoretical and doctrinal frameworks and hierarchies that entrench and 'secrete' existing rights and the current 'distributional configuration' of society behind a purely 'corrective, regulative, stabilizing and preservative' notion of social justice, and replaces it with a notion that is purposely developed around 'norms, principles, and categories of analysis directly applicable to the evaluation of distributional outcomes'.¹⁷² In this regard, Michelman's recognition of the actual lack of social

170 Michelman (2002) 1 *Int J Const Law* (forthcoming, fn 15 above) chap IV.

171 See Margaret Jane Radin *Reinterpreting Property* (1993) 6 for an explanation of the pragmatist approach from the middle, within the system.

172 Michelman (1973) 121 *Univ Penn LR* 962–1019 (fn 78 above) at 963; see fn 102 above and surrounding text.

justice in contemporary society results in a theoretical switch – echoed by Critical Legal Studies (CLS) scholars two decades later – that has significant critical implications for the theory of social rights in general.

The critical potential of Michelman's needs-based approach can be illustrated with reference to the South African Constitutional Court decision in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others*.¹⁷³ The case was precipitated by efforts of the national works department to relocate members of a community, whose shacks were washed away when the Jukskei River north of Johannesburg flooded parts of the township of Alexandra in March 2000, on vacant state land surrounding the Leeuwkop Prison. Members of the white, affluent residential area of Kyalami in the vicinity protested against the plans to house the flood victims on the prison land, mainly on the basis of (a) the argument that the state was not specifically empowered or authorised to build the houses in question, and (b) concern about non-compliance with environmental and planning laws and regulations. The Constitutional Court dismissed the objections of the Kyalami residents, arguing that (a) the state derived its authorisation to provide housing from the right to housing enshrined in section 26 of the Constitution¹⁷⁴ and (b) that compliance with the relevant laws and regulations was still possible.¹⁷⁵ Remarkably, despite the finding that the state was authorised and obliged by section 26 of the Constitution to provide housing for people in a housing crisis, and despite the Court's reference to its earlier decision in *Grootboom*, where it was decided that the state's housing policy has to make special provision for genuine crises and emergencies to be reasonable,¹⁷⁶ the Constitutional Court in *Kyalami* found it necessary to support its decision with the argument that the state, as owner of the land in question, had the same right as any private landowner to develop its property in accordance with the applicable planning and building laws.¹⁷⁷ Counsel for one of the parties in *Kyalami* argued that the flood victims had a constitutional right to be given access to housing, and that such a right had to take precedence over any rights that the Kyalami residents may have, including their rights under the relevant planning and environmental laws,¹⁷⁸ and the Court clearly heard and appreciated this argument,¹⁷⁹ but nevertheless elected to rely on a completely unnecessary and frankly ill-considered and unconvincing privatist argument about the development rights of the state as landowner. In the perspective of the Court's property argument, the crisis or emergency context of housing need is downplayed, with the result that state compliance with normal planning and building laws becomes crucial to support the Court's order. From the needs-based, constitutional duty perspective of Michelman's minimum protection argument (and the similar *Grootboom* argument), the crisis or emergency context would have been given stronger recognition, and consequently compliance with normal planning and building laws would have been largely irrelevant or at least negotiable. The Michelman approach highlights the contextual and transformative aspects of the case that are, at least partially, hidden from view or devalued by the private rights argument employed in *Kyalami*.

Secondly, Michelman develops his vision of social justice around the notion of a social minimum, a social insurance that has to be satisfied to address individual need before other distributive concerns are considered. Given the emphasis on need and weakness as the point of

173 2001 7 BCLR 652 (CC).

174 *Kyalami* (fn 172 above) par [37]–[39].

175 *Kyalami* (fn 172 above) par [114].

176 *Kyalami* (fn 172 above) par [38], referring to *Grootboom* (fn 1 above) par [40], [52], [96].

177 *Kyalami* (fn 172 above) par [39], [40], [48], [114].

178 *Kyalami* (fn 172 above) par [113].

179 *Kyalami* (fn 172 above) par [114].

departure, Michelman identifies the securing of minimum social welfare (improvement of quality of life) as the first order of business. In other words, corrective justice – subject to an as yet unidentified minimum – is given absolute priority over distributive justice in general, and all distributive (economic) argument is postponed until the corrective minimum has been secured. In effect, the regulative and stabilising logic and effect of the traditional rights paradigm are suspended until the corrective minimum prescribed by our moral intuition or sense of justice has been safeguarded – individual rights can only compete on the basis of relative power once it has been established that no individual falls below the morally acceptable minimum power threshold. Exactly what the minimum threshold is has to be established in a concrete situation and can change over time,¹⁸⁰ and although the minimum welfare theory takes absolute need as its point of departure, considerations of relative inequality might play a role in giving content to the notion of minimum protection.¹⁸¹ This means that Michelman keeps the theory of social rights flexible while ensuring that it is grounded firmly in the transformative notion of securing a minimum threshold of social insurance.

Thirdly, the notion of a social minimum recognises and accommodates the idea that relative inequalities in income, wealth and power (social inequality or the general poverty gap) can be addressed progressively, through a range of strategies, over time, provided the minimum has been satisfied as a non-negotiable first step. Progressive eradication of poverty and improvement of quality of life has to start somewhere, and in Michelman's theory – echoed almost exactly, three decades later, in the South African Constitutional Court's *Grootboom* judgment¹⁸² – that starting point is a threshold requirement that is bracketed out of the efficiency-based business plan that might embody the main strategy of a war against poverty and socio-economic inequality. This places a different complexion on the significance and meaning of 'progressive realisation' arguments about the enforcement of social and economic rights, as it restricts talk about efficiency to the stage of progress where the threshold has already been established and secured. By drawing attention to this division between the normal business of economic policymaking and the abnormal duty of providing a social security threshold for the socially and economically deprived, Michelman alerts us to the logical limits of his own theory – it suggests the existence of a sphere where the normal logic of economic rationality and efficiency does not apply, but it does not prescribe how that logic should function or be evaluated in its 'proper' sphere.

Finally, the social minimum is construed as a constitutional right and a constitutional obligation alongside equality and others.¹⁸³ Michelman's aim is not merely to set out a strong supportive moral argument in favour of social justice, but to establish, on the basis of that moral argument, that minimum welfare is a constitutional right that can and should be enforced by the courts even when the right is not explicitly codified in the US Constitution. The

180 Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above) at 684; see fn 168 above and surrounding text.

181 Michelman (1969) 83 *Harv LR* 7–59 (fn 78 above) at 57; see fn 96 above and surrounding text.

182 2001 (1) SA 46 (CC) (fn 1 above) par [95]: based on the requirement in s 26 of the South African Constitution that the state must take reasonable steps to provide access to housing, it was held that the existing housing programme fell short of the requirement 'in that it failed to provide for any form of relief for those desperately in need of access to housing', i.e. for the emergency provisions required to lift people in real crisis situations above the minimum threshold.

183 This point was also echoed by the *Grootboom* judgment (previous fn above) par [94]: '... the State is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce'. See fn 1, 8 above and surrounding text.

jurisprudential, moral, procedural and interpretivist arguments are all intended to provide support for the conclusion that minimum welfare is just as surely and just as securely guaranteed by the US Constitution as any of the other well-established and widely accepted implied or 'non-enumerated' rights that are enforced by the US courts.¹⁸⁴ In the final analysis, this right is presented as a political right in the sense that its recognition and enforcement reinforces the basic political value of representation or participation in the constitutional democracy.¹⁸⁵ Without that minimum insurance, the basis of the constitutional and participatory democracy itself is in danger, and therefore securing the minimum is a constitutional priority.

Michelman's theory of social justice takes extreme need or deprivation as its starting point and ensures that a minimum threshold of social insurance should be provided before the normal economic balancing of rights can take place. However, the real power of the theory emerges from the fact that Michelman translates the moral obligation arising from extreme need into a constitutional duty. The result of this translation is that social justice theory and practice do not remain locked into needs talk, but take place within the traditionally powerful discourse of rights. This is an important strategy that underlines the transformational significance of Michelman's theory, both as a theory that justifies the constitutionalisation of social rights and as an interpretative theory that explains the interpretation and enforcement of constitutional rights relating to social justice.

IV TRANSFORMATION-BASED THEORY

Polyphony: Polyphony refers to music written in several parts, in which the individual parts are often melodically and rhythmically independent of each other. They are so independent, in exacting forms of polyphony, that each line or part could be sung or played independently as a melody.

All Music Guide Glossary <<http://allmusic.com/cg/amg.dll?p=amg&sql=S2349>>

(a) Needs Talk vs Rights Talk in an Either/Or Theoretical Grammar

The overview in the second and third sections of the essay above introduces two contrasting theoretical approaches to the explanation and justification of constitutional entrenchment and judicial enforcement of social and economic rights – one approach is based on need, the other on rights. Each of these theoretical approaches has certain strengths and certain weaknesses, especially when considered in the context of large-scale poverty, social and economic marginalisation, and the constitutional obligation to transform. Michelman's theory straddles the disjunction between the two theoretical approaches, as he translates the moral theory based on need into a constitutional theory of minimum social and economic rights.

Although he was the first major contemporary legal theorist to focus on need as the theoretical basis for explanation and justification of the enforcement of social and economic

184 Such as freedom of association (*NAACP v Alabama ex rel Patterson* 357 US 449 (1985) and the right of privacy (*Griswold v Connecticut* 381 US 479 (1965); see L Tribe *American Constitutional Law* (2nd ed 1988) 785, 1010; 1302, 1338). Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above) 667 refers to Ely's discussion of provisions in the Ninth and Fourteenth amendments to the US Constitution.

185 Michelman (1979) 3 *Wash Univ LQ* 659–693 (fn 78 above) at 684; Michelman (2002) 1 *Int J Const Law* (forthcoming, fn 15 above) chap IV; see fn 168–169 above and surrounding text.

rights, the notion of need as the basis of social and economic rights predates Michelman's work as discussed above. William Simon¹⁸⁶ explains how social workers have employed a similar view to support their approach to the enforcement of social rights outside of the jurisprudence of the US courts, at least a couple of decades before Michelman wrote his theoretical exposition of needs-based theory. In turn, Simon's historical analysis forms part of a larger theoretical critique of traditional rights discourse, inspired by critical legal thinking during the 1980s, roughly 15 years after the first Michelman article was published. In this perspective, Mark Tushnet's famous essay on rights¹⁸⁷ is significant for the discussion of Michelman's theoretical approach. Tushnet argues that the notion of rights is unstable and indeterminate; that it reifies real experiences into empty abstractions, and that rights discourse impedes progressive advances (political disutility).¹⁸⁸ Tushnet further points out that the CLS (Critical Legal Studies) critique of rights results in a paradox or anomaly, in that it simultaneously relies heavily on relativism and culminates in a pragmatic assessment of rights, which is impossible in a relativised system.¹⁸⁹ Of the two rejoinders proposed by Tushnet to respond to this paradox of relativism, one (called 'oppositionism') takes as its point of departure the fact that 'there is unnecessary suffering in the world we have chosen to create',¹⁹⁰ and that that in itself is enough to 'ground the critique of rights, to justify opposition to the way things are'. The 'sure and certain knowledge that things can be better than they are' is what grounds the choice to 'join the party of humanity' in the struggle against unnecessary suffering.¹⁹¹ In effect, Tushnet is associating the struggle against suffering and need with the critique of rights, which may be taken as implying that suffering and need provide better foundations for a theory of social justice than does any theory based on the notion of rights. This radical critique differs from Michelman's theory in that Tushnet proposes a departure from the language of rights in favour of the language of needs, whereas Michelman justifies the recognition and enforcement of constitutional rights on the basis of moral arguments relating to need and extreme deprivation.

It is a well-known fact that the CLS critique of rights (and concomitant focus on needs) met with opposition from unexpected quarters, including critical gender and critical race theorists,¹⁹² on the basis that it makes no sense to destroy, through critical analysis, a powerful legal institution from which marginalised people have been excluded, but which might paradoxically be used to promote their social and political empowerment. A similar argument holds in the South African context with regard to the notion of nationalisation of land and mineral resources: destroying the legal institutions from which marginalised South Africans have been excluded, just when they reach the position where they might gain access to those institutions, does not necessarily promote the case for empowerment and enlightenment. This response to the CLS critique of rights discourse highlighted the fact that an either/or polarisation, which reduces the differences between rights-based and needs-based theoretical approaches to a simple choice for and against, will probably be too unsophisticated to be of much use. This is underscored by Jeremy Waldron,¹⁹³ who argues that there is no necessary disjunction between

186 Simon (1986) 38 *Stan LR* 1431–1516 (fn 91 above) at 1489–1492.

187 M Tushnet 'An Essay on Rights' (1984) 62 *Texas LR* 1363–1403.

188 Tushnet (1984) 62 *Texas LR* 1363–1404 (previous fn above) 1364–1394.

189 Tushnet (1984) 62 *Texas LR* 1363–1404 (fn 186 above) 1394.

190 Tushnet (1984) 62 *Texas LR* 1363–1404 (fn 186 above) 1397.

191 Tushnet (1984) 62 *Texas LR* 1363–1404 (fn 186 above) 1403.

192 See e.g. Patricia J Williams 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' (1987) 22 *Harvard CR-CL LR* 401–433.

193 Jeremy Waldron 'Rights and Needs: The Myth of Disjunction' in A Sarat & TR Kearns *Legal Rights: Historical and Philosophical Perspectives* (1997) 87–109.

rights and needs, and that one should not abandon rights talk simply to be able to introduce needs talk into the debate about social justice – in Waldron’s view, ‘rights talk provides an indispensable *framework* in which needs talk can be related to ideas about personhood, self-assertion, and dignity’.¹⁹⁴ Although I do not subscribe to Waldron’s ideas about personhood, or share his view that talking about needs within the rights framework would ‘give them a certain integrity and dignity that claims of need do not always have on their own’,¹⁹⁵ one can certainly relate to the notion that rights talk and needs talk do not necessarily have to exclude each other in a debate about social discourse. The question that I shall address in the rest of this essay is whether rights talk and needs talk about social and economic rights might not possibly each have its own place, so that they do not have to be seen as alternatives or as the one underlying or grounding the other. In looking for such a non-disjunctive reading of rights talk and needs talk, one is not restricted to Waldron’s rights bias either – Michelman provides a different version of the non-exclusionary approach by restricting rights talk (with its normal logic of economic efficiency and rationality) through the introduction of a needs-based threshold.

(b) The Attractions of Needs Talk

Regardless of one’s view on Tushnet and the CLS critique of rights, needs talk undeniably has its attractions in the debate about social discourse. Michelman’s needs-based theory of minimum welfare is clearly superior to the traditional rights-based theories in explaining the constitutional entrenchment of certain basic or minimum socio-economic rights against the state, and because of its limited scope and implications¹⁹⁶ his theory also escapes most of the theoretical concerns about judicial enforcement of these rights. Its particular attraction, compared to the property and procedural fairness theories and perhaps even the equality theories, is that it offers a sound theoretical basis for the ante omnia protection of people in genuine emergency situations and of people who live in conditions that are morally, socially and politically unacceptable in the context of that particular society at that particular time. In other words, this theory sets an absolute standard of need that has to be addressed before any other aspect of distributive justice or economic efficiency can be considered, but it also makes room for defining that absolute standard of need within the context of a specific society. As is illustrated by the *Grootboom* and *Kyalami* judgments of the South African Constitutional Court,¹⁹⁷ this needs-based approach succeeds in highlighting the constitutional, contextual and transformative aspects of providing access to social and economic rights and benefits to people in genuine crises and emergencies, including people who live in unacceptable conditions, without access to basic shelter, food and water, health care and education.

The major attractions of the needs-based theory of minimum welfare are that it

- (i) takes the unacceptability of the current distribution of and access to social and economic resources and the concomitant need for transformation as its point of departure, thereby establishing the theory firmly within a transformative context;

194 Waldron in Sarat & Kearns (1997) 87–109 (previous fn above) 105.

195 Waldron in Sarat & Kearns (1997) 87–109 (previous fn above) 105.

196 In the sense that the focus on extreme poverty or need sets a determinate or determinable standard for adjudication and restricts the courts’ function to alleviation of the immediate individual need, without having to judge or adjust the relative fairness of the current distribution of wealth or resources in general; see the introductory section on Michelman’s theory above.

197 See fn 172–178 above and surrounding text.

- (ii) leaves room for the contextual definition of what absolute need is in a specific society at a specific time, and so allows for gradual or progressive realisation of the rights over time;
- (iii) but nevertheless justifies the entrenchment and enforcement of social and economic rights as constitutional rights, and not as regulation-prone legislative or administrative gratuities;
- (iv) moreover, the needs-based theory takes as its starting point relief of absolute need rather than relative inequality, and succeeds in tying the provision of social and economic rights and benefits in with basic constitutional values such as dignity, equality and others without making the provision of the rights dependent on relative deprivation of those values;
- (v) promotes transformation by making it possible to secure weak rights and to extend social and economic rights to people who have no legally enforceable right or entitlement to the benefits in question; and
- (vi) avoids most concerns about judicial enforcement because it works with a restricted and determinable standard of what judges can and should do.

In all these respects, the needs-based theory of minimum welfare is clearly superior when it comes to the position of those who are really in need. Michelman takes care to emphasise that the standard of minimum need is flexible, and that both the level of what is unacceptable living conditions and the benefits that should qualify as minimum welfare (housing or shelter, health care, basic nutrition and clean water, basic education) are contextually and culturally determinable, but it is nevertheless clear that a system of social and economic rights based on the notion of minimum welfare should probably include two sets of considerations, both of which are flexible in content and determined by social, political, economic and cultural context.

Firstly, it must be determined when a situation demands state intervention through provision of minimum welfare assistance. It is likely that basic relief in genuine emergency situations (victims of floods and other natural disasters, refugees in war situations) has to be the absolute minimum, to which should be added living conditions that are considered unacceptable even in the absence of sudden emergencies or disasters.

Secondly, the content of what has to be provided to address the situation adequately has to be determined (housing or shelter, basic nutrition and clean water, health care, education). In each case, the inquiry has to proceed from the premise that the concrete need of the actual people involved must be the main focus, and not questions of relative deprivation or economic efficiency in the distribution of scarce resources.

Recent decisions of the South African Constitutional Court illustrate the transformative potential as well as the difficulties involved in the application of a needs-based approach in South African constitutional law. In *Grootboom*,¹⁹⁸ residents of a so-called informal settlement approached the court¹⁹⁹ to ask for protection against the threat of eviction by their local authority. The community in question originally lived in unbearable squalor in another settlement, from where they moved on their own initiative, without permission or compliance with town planning or housing formalities, and settled on private land that was earmarked for development. The Cape High Court²⁰⁰ granted an order for the provision of temporary shelter by the local and provincial authorities, based on the protection of children's constitutional right to shelter,²⁰¹ whereupon the government (national, provincial and local) appealed to the

198 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC). See fn 1 above and surrounding text.

199 Initially the Cape High Court. This judgment is reported as *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C).

200 Per Davis J, with whom Comrie J agreed; see the previous fn above.

201 S 28(1)(c) of the Constitution.

Constitutional Court. The decision of the Cape High Court was overturned on appeal, and it was held that the government's housing programme²⁰² did not comply with the constitutional requirement that 'reasonable legislative and other measures' had to be taken to realise the right to access to housing.²⁰³ According to this Court, the housing provision in section 26 of the Constitution does not give a right to housing on demand, but it 'does oblige the State to devise and implement a coherent, co-ordinated program designed to meet its s 26 obligations', which means that the programme has to be reasonable, and a housing programme that concentrates exclusively on the development and provision of the formal housing stock, without making any provision for emergency and crisis situations, is not reasonable 'in that it failed to provide for any form of relief to those desperately in need of access to housing'.²⁰⁴

The salient points in the *Grootboom* decision are that

- (i) the constitutional duty of the state to provide access to housing creates rights that will be enforced by the courts;
- (ii) in this case, the right to housing was enforced through a court holding that the current housing programme was not reasonable and therefore in violation of the constitutional obligation; and
- (iii) the Court arrives at the finding that the housing programme is not reasonable by refusing to look at the provision of formal housing only, insisting instead on looking at the position of the very poorest and weakest members of the community, who are desperate for housing and cannot wait patiently for their turn on the official waiting list.

In other words, the duty to devise and implement a reasonable programme for the provision of access to housing includes a duty to develop the formal housing stock and a duty to provide access to housing outside of the normal, formal process, in order to accommodate those who have more urgent or emergency-type housing needs. In arriving at this conclusion, the Constitutional Court approached the meaning of section 26 from a rights-based perspective (access to the formal housing stock in the normal course of events) that is subject to a needs-based threshold (access to housing for those in desperate need), thereby illustrating the inadequacy of a single, simplistic focus on rights and the superiority of an approach that also takes cognisance of needs.

The *Grootboom* decision can be criticised for being cast in the form of rationality review, in other words concentrating on the question whether the housing policy in question was reasonable in the purely formal sense of being rational and in accord with the structural requirements of good governance.²⁰⁵ In this perspective, the rational or structural coherence of the state housing programme is the focal point rather than substantive issues of individual need or deprivation. Generally speaking, this criticism rings true, in that the Constitutional Court

202 As set out on the national level in the White Paper on Housing, the Housing Act 107 of 1997, the Housing Consumers Protection Measures Act 95 of 1998, the Development Facilitation Act 67 of 1995, and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; and the provincial Western Cape Housing Development Act 6 of 1999; and applied by the local authority in its implementation programme. See *Grootboom* (fn 197 above) at par [47].

203 As guaranteed in s 26(2); see *Grootboom* (fn 197 above) paras [34]–[38] for the Constitutional Court's analysis of the 'reasonableness' requirement and paras [93]–[96] for the conclusion that the programme in place was not reasonable.

204 *Grootboom* (fn 197 above) par [95], read with paras [34]–[38].

205 Theunis Roux explains this criticism in (2002) 12 *Constitutional Forum* 41–51. See further Roux 'Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court' (forthcoming); D Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance' (2002) 119 *SALJ* 484–501.

does seem to reduce the notion of reasonableness as it is used in *Grootboom* to rationality that merely ensures that people are treated fairly, rather than entering into distribution issues substantively and forcing the government to alleviate the plight of the homeless. However, having said that, the *Grootboom* court nevertheless established a fairly high level of scrutiny for rationality-based reasonableness. Something like Michelman's needs-based minimum insurance argument can therefore be used as a theoretical framework to explain the Constitutional Court's approach in this case, resulting in a rationality approach that at least takes care of extreme need and deprivation before indulging in the purely economic logic of efficiency in addressing relative deprivation.

However, in the subsequent case of *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others*²⁰⁶ the Constitutional Court curiously failed to build upon the potentially transformation-sensitive foundation laid down in *Grootboom*. In *Kyalami Ridge*, the community's housing needs were more obviously of an emergency nature than was the case in *Grootboom*,²⁰⁷ and yet the Court failed to develop the needs-based approach of the *Grootboom* decision further,²⁰⁸ electing instead to justify the government's actions in providing housing for the homeless community on the ultimate rights-based argument, namely that the state had the same rights as any other landowner in developing its own land, provided it complied with the requirements of normal planning and building laws.²⁰⁹ This aspect of the *Kyalami* decision is unsatisfactory because it fails to highlight the public-law nature of the state's duties in the provision of housing, and because it fails to develop and strengthen the promising needs-based approach set out in *Grootboom*.

More recently, the *Grootboom* decision was used as the basis for a further decision that can also be explained with reference to a needs-based approach to the provision of social and economic rights – in this case, the right to health care services in section 27(1)(a) of the Constitution. In *Treatment Action Campaign v Minister of Health*²¹⁰ (*TAC*) the Transvaal High Court relied on *Grootboom* in deciding that the national and provincial health authorities were not meeting their constitutional obligations in 'taking reasonable legislative and other measures'²¹¹ to ensure access to suitable health care facilities. According to the High Court,²¹²

206 2001 (7) BCLR 652 (CC); see fn 172–178 and surrounding text above.

207 In the sense that the *Grootboom* community – whose living conditions were clearly unacceptable to start off with – arguably contributed to their own emergency situation by settling on private land without permission, whereas the *Kyalami* community's houses were washed away in a flood. Obviously there is no profit in playing the two communities' needs off against each other, but it can be argued that the Court could have justified a needs-based approach even more easily in *Kyalami* than in *Grootboom*, where it was willing to do so simply because the community was living under unacceptable conditions.

208 Although the Court did rely on s 26 of the Constitution as the basis of the state's authority to provide housing; see fn 175 above. The absolute deprivation approach in *Grootboom* was therefore not so much ignored in *Kyalami* as supplemented – unnecessarily – by a property-based rights approach.

209 *Kyalami* (fn 206 above) par [39], [40], [48], [114]. See fn 175–176 and surrounding text above.

210 2002 (4) BCLR 356 (T). The Government's appeal against this decision was dismissed by the Constitutional Court in *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC). See the discussion of the case by Johnny Steinberg (in discussion with Wim Trengove SC) in *Business Day* 09 Jun 2002 <<http://www/bday.co.za/bday/content/direct/1,3523,1079778-6096-0,00.html>>.

211 As prescribed by s 27(2) of the Constitution, which resembles s 26(2), on which the decision in *Grootboom* was based. In *TAC v Minister of Health* Botha J pointed out that this resemblance in phraseology was an important consideration in relying on *Grootboom* and distinguishing the Constitutional Court's decision in *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), which was based on the right to emergency health care in s 27(3) of the Constitution (The Constitutional Court held that Mr Soobramoney was not entitled to relief under s 27(3) as his condition was chronic rather than the result of an emergency). Ironically, the explicit provision for emergency health care in s 27(3) probably robbed Mr Soobramoney of a needs-based 'emergency' argument along

the courts are not overstepping the boundaries of their judicial duties in deciding upon the reasonableness of the government's programmes for social and economic transformation under sections 26 or 27 of the Constitution – in doing so, the courts are upholding rather than undermining the separation of powers. Even though it is the government's task to make policy decisions, and accepting that there may be more than one way of progressively realising the right to health care, the courts' duty is to determine whether the steps taken have been reasonable under the circumstances. In the *TAC* case, giving HIV-positive mothers and babies in state facilities access to Nevirapine would provide '... another means of access, less structured, less perfect [than the government's prohibitory and slow process of testing], but infinitely to be preferred to the choice between all or nothing'.²¹³ The decision was substantially upheld on appeal to the Constitutional Court,²¹⁴ where it was confirmed that socio-economic rights are justiciable²¹⁵ and that the government's policy in developing and implementing programmes for the progressive realisation of those rights has to comply with the relevant constitutional requirements and prescriptions. The Constitutional Court confirmed the *Grootboom* finding that the existence of a minimum core of a particular right or service²¹⁶ may be relevant in determining reasonableness of the state's programmes, but not as an independent right entitling everyone to demand state delivery of that core content to them.²¹⁷ The duty of the courts with respect to socio-economic rights is not to make policy or to order the state to follow a certain policy, but to test whether the state's chosen policy is reasonable and in accordance with constitutional requirements.²¹⁸

The Constitutional Court confirmed the needs-based threshold nature of the *Grootboom* decision's formulation of reasonableness, namely that 'those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right'.²¹⁹ In this particular case, it was unreasonable of the government to prevent or withhold the use of Nevirapine for HIV-positive mothers and babies while a perfect overall strategy and infrastructure for its delivery was being devised, and consequently government policy was unconstitutional.²²⁰ The overall government programme also had to be revised to make it more flexible in providing for both long-term structural and short-term emergency situations.²²¹ The Court was at pains to emphasise that the courts cannot enforce a particular policy, but they can and must make orders that have an impact on policy in situations where the state has failed to formulate and implement its policy in accordance with its constitutional obligations.²²² The government was therefore ordered to remove restrictions on the availability of Nevirapine to HIV-positive mothers and babies and to take reasonable steps to extend testing and counselling services at state institutions.

the Michelman or *Grootboom* lines discussed in this essay, while the same explicit provision was interpreted so narrowly by the Court that he could not qualify for the explicit emergency relief either.

212 *TAC* (fn 209 above) at 379J–381J.

213 *TAC* (fn 209 above) at 384D. Journalist Peter Sidego expressed similar sentiments: 'Mbeki Stel Realiteite nou in Perspektief' *Die Burger* 01/05/2002 p 10.

214 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC).

215 Par [25].

216 As defined by the UN Committee in respect of the International Covenant on Economic, Social and Cultural Rights.

217 Par [34].

218 Par [36], [38].

219 *Grootboom* (fn 197 above) par [44], *TAC* (fn 213 above) par [68].

220 Par [73], [80].

221 Par [95].

222 Par [98], [99].

Within the framework of rationality review established and followed by the Constitutional Court, the threshold attitude to reasonableness accords at least partially with Michelman's needs-based approach in the sense that access to health care is not only evaluated on the basis of what may be a reasonable state programme for the progressive realisation of the right,²²³ but also on the basis of whether and how more urgent needs can and should be served in addition to and even in preference to the requirements of the slower, mainstream programme. In this sense, Michelman's theory provides a very useful interpretation framework within which the South African Constitutional Court's judgments on social and economic rights can be explained and evaluated. At the very least, Michelman's approach can provide an interpretive framework within which the negative aspects of the Constitutional Court's narrow rationality logic can be diminished, in the sense that the rationality or structural good governance test can be supplemented by a somewhat broader and more substantive minimum welfare threshold that postpones efficiency argumentation until the needs of the poorest and weakest have enjoyed some attention. At the same time, the Michelman approach also holds out further promise for the development of a less formal and more substantive approach to the constitutional guarantee of social and economic rights. As Michelman demonstrated so effectively in his procedural fairness argument in support of minimum welfare, even a seemingly formal, procedural approach can and often does accommodate nonformal or associational aims that promote the substantive protection and enforcement of minimum welfare interests.

(d) The Limitations of Needs Talk

Despite their obvious value in the context discussed above, poverty or needs-based theories of social and economic rights are not without problems of their own.

Firstly, it is clear that Tushnet's out-and-out needs-based approach can have no more than a very restricted appeal.

Secondly, it appears from Michelman's theory and from the *Grootboom* and *TAC* decisions that a straightforward needs-based approach cannot do everything – there are contexts and situations where a needs-based approach to the explanation, justification or enforcement of social rights may not be suitable or sufficient to ensure and promote transformation and social justice.

Thirdly, there are theoretical objections against poverty-based theory in general, and a needs-based theory of social and economic rights should take careful note of these objections. Casting the debate about social and economic rights into the rhetoric of poverty, weakness and marginality brings with it a new set of problems and theoretical dilemmas. Ross²²⁴ shows that poverty or marginality rhetoric has already created a distinction between the poor and the rest, between them and us, which informed Supreme Court jurisprudence in the United States to the detriment of the poor. This is especially dangerous when the distinction between the poor and the rest is accompanied by rhetorical assumptions or assertions about the social nature and reasons for poverty and about judicial helplessness in changing the structure of society or the system of law to accommodate or alleviate the causes or the effects of poverty. Rhetorical assumptions about the moral weakness of the poor or about the distinction between deserving

223 In *TAC* the state programme was also held to be unreasonable because it did not provide evidence of a comprehensive and coordinated plan for the progressive realisation of the right, particularly with regard to Nevirapine: *TAC* (fn 209 above) at 384E.

224 T Ross 'The Rhetoric of Poverty: Their Immorality, Our Helplessness' (1991) 79 *Georgetown LJ* 1499–1547.

and undeserving poor play an important part in upholding social and judicial responses to poverty. It is worthwhile to keep in mind that a theory of poverty, based on social Darwinism, formed the backbone of nineteenth century refusal to place any duty on the state to alleviate poverty. Any theoretical attempt to construe the justification or the recognition of a justiciable welfare right or social minimum on the basis of poverty or marginality will have to recognise and respond to the danger of thereby reinforcing existing rhetorical assumptions and strategies that undermine rather than promote social and judicial recognition of these rights. This danger could be avoided to a certain extent by focusing on marginality rather than exclusively on poverty, which would have the added benefit of reinforcing welfare discourse by aligning it with established feminist, race and other discourses in which theoretical arguments have been developed for the dangers and the benefits of ‘us and them’ rhetoric, and in which political and theoretical strategies have been worked out to move towards enforcement practices.²²⁵

The biggest problem with even Michelman’s nuanced needs-based theory of social and economic rights is that it addresses only extreme need, and nothing more. While a needs-based approach is clearly superior to rights-based approaches in explaining and justifying the protection of social and economic interests of the very poorest and weakest members of society, it fails to explain entrenchment and enforcement of at least two other categories of social and economic interests. Firstly, a rights-based approach (and various rights-based theories) may be more suitable for the protection of rights and interests that enjoyed some protection (even before our Constitution) on the basis of something resembling vested or acquired rights.²²⁶ Secondly, a different theoretical approach and other theories might be required for those interests that are not justified by need in the sense of extreme poverty or emergency as foreseen by Michelman or in *Grootboom*, and that cannot rely on rights-based theories either, as they do not rest on acquired or vested rights. It therefore seems necessary to consider a multistranded or pluriform rather than a uniform theoretical approach to the protection of social and economic rights, and to accept that different theoretical approaches may be suitable for different categories of interests or for different sets of circumstances. The possibilities of such a multistranded theoretical approach are investigated further in the next section of the essay below.

(e) Twisting Rope: A Multistranded Theoretical Approach

On the basis of the considerations set out above, I want to argue that a theory of social and economic rights should accommodate concerns in at least three areas, and that different and perhaps even divergent theoretical approaches could feature in each of them. With Frank Michelman,²²⁷ I accept that inchoate and multifaceted – imperfectly matched, perhaps even

225 See e.g. Lucy A Williams ‘Welfare and Legal Entitlements: The Social Roots of Poverty’ in David Kairys (ed) *The Politics of Law: A Progressive Critique* (3rd ed 1998) 569–590; Patricia Williams (1987) 22 *Harvard CR-CL LR* 401–433 (fn 191 above); Jennifer Nedelsky ‘Reconceiving Rights as Relationship’ (1993) 1 *Rev Const Studies* 1–26; Martha Minow ‘Interpreting Rights: An Essay for Robert Cover’ (1987) 96 *Yale LJ* 1860–1915. W Brown ‘Suffering Rights as Paradoxes’ (2000) 7 *Constellations* 230–241 at 230 fn 2, 3 refers to a similar kind of paradoxical acceptance of liberal theory, quoting G Spivak *Outside in the Teaching Machine* (1993) 45–46 (liberalism is that which we cannot not want) and Patricia Williams (1987) 22 *Harvard CR-CL LR* 401–433 (this fn above) 165 (rights should also be procured for trees, animals, rivers and rocks).

226 E.g. rights relating to a contributory pension or medical scheme, employment based on contract with the state, etc.

227 See fn 80–81 above and accompanying text.

contradictory – theory is better suited to the task of explaining and justifying the enforcement of social and economic rights than any single, neat, uniform formal doctrine.²²⁸

The three areas that should be addressed by theories of social and economic rights correspond with three categories of social and economic rights and interests: (i) social and economic rights that are or have already been protected or recognised as vested or acquired rights or as legitimate expectations; (ii) social and economic interests that can be protected on the basis of a needs-based or minimum protection theory; and (iii) social and economic interests that fall short of legally recognised and protected vested and acquired rights, but nevertheless do not quite qualify for needs-based protection, either because they are not as serious as the emergency and desperate situations foreseen by Michelman or in *Grootboom*, or because they are quite serious but have to compete with other, similar demands for limited resources.

(i) Constitutional, Vested and Acquired or Otherwise Recognised Rights

For the first category, rights-based theory can provide a sound point of departure. This could adopt the form of Reich's new property theory, or (given the South African Constitution's explicit protection of social and economic rights) a constitutional rights theory,²²⁹ or a theory of administrative justice.²³⁰ A combination of legitimate expectation discourse²³¹ and due process discourse, softened by Michelman's associational aims argument²³² could offer interesting perspectives for further development in this area. Judging from existing literature and experience, it seems unlikely that a single rights-based theory will provide a completely satisfactory solution for rights and interests in this category, and a combination of theoretical approaches might be useful. From the South African perspective, such a theory needs to account for possibilities on the basis of obviously relevant constitutional provisions such as the guarantee of equality,²³³ property,²³⁴ administrative justice,²³⁵ but also of less obvious but equally useful and promising provisions such as dignity,²³⁶ and of course provisions directly relating to social and economic rights such as housing, health care and social welfare.²³⁷ The theory will have to reflect concern for the determination and the deprivation of social and economic rights

228 In a still unpublished manuscript entitled 'The Virtue of Vagueness in Takings Doctrine' MR Poitier argues that the vagueness of takings and nuisance doctrine is what enables property law to function as a dynamic institution. See further CM Rose 'Crystals and Mud in Property Law' (1988) 40 *Stan LR* 577–610.

229 Including, but not restricted to, a theory based on equality or dignity. See the section on equality-based theory above.

230 In the latter case, Michelman's non-formal approach to due process is clearly superior to the purely formal approach of some courts; see the section on Michelman's procedural fairness argument above.

231 As followed in the UK and South Africa; see the section on procedural fairness-based theory above.

232 See the section on Michelman's procedural fairness argument above.

233 S 9 of the 1996 Constitution. In this instance, De Vos's interpretation of substantive equality jurisprudence provides a good point of departure. See the section on equality-based theory above.

234 S 25 of the 1996 Constitution. Something like Reich's theory of new property is required here, but with substantial amendment to accommodate criticism against Reich's theory and recent developments in constitutional property generally (see the section on property-based theory above), as well as the unique characteristics of the South African property clause. Comparative experience may be useful; see further Van der Walt *Constitutional Property Clauses* (1999) chapters on Germany, European Council.

235 S 33 of the 1996 Constitution. See the section on procedural fairness-based theory and the section on Michelman's procedural fairness argument above.

236 Section 10 of the 1996 Constitution. Note that Michelman takes dignity into account in his theory of minimum welfare; see especially the sections on his moral and jurisprudential arguments above.

237 Subsecs 26, 27 and 28 of the 1996 Constitution.

and interests,²³⁸ and will have to extend beyond mere formal due process concerns to substantive aspects of the acquisition, retention and protection of these rights. The theory will also have to reflect awareness of and sensitivity for the transformative goals and commitments of the Constitution.²³⁹

A special concern in this respect is that strong protection of vested or acquired rights – regardless of whether they are property-like rights or different social and economic rights – is not necessarily an unmixed blessing. The exclusivist property logic of Reich’s theory is problematic in itself, as was argued earlier, but even the strong protection of other vested rights that do not resemble property can be problematic, in the sense that it can tend to strengthen the traditional hegemony of existing rights in the continuing struggle between stability and change. Different theoretical approaches can support or promote diverging political goals and strategies, and often these goals and strategies will require critical consideration and evaluation in their own right before one can determine the value of the theoretical approach.

Not much more need to be said about this category, except that the fact that these rights are recognised and protected will not necessarily solve all problems – enforcement in the sense of convincing the courts that the rights need to be protected, and finding a suitable remedy may well be a separate problem that requires separate justification and theoretical explanation. Generally speaking, though, this facet of a theory of social and economic rights will be characterised by the fact that it relies largely on relatively settled and traditional notions of the protection of legally or constitutionally recognised, acquired or vested rights. Here, rights talk may well be suitable for the task, and it should not be dismissed out of hand on the basis of (otherwise justified and necessary) critiques of rights. When it is softened and contextualised by the kind of transformation orientation that characterises De Vos’s theory of equality jurisprudence, rights talk can do good work in this category of situations.

(ii) Extreme Need, Poverty, Marginalisation, Emergencies

For the second category, Michelman’s needs-based theory provides a better theoretical explanation than the rights-based theories²⁴⁰ – Michelman’s theory explains both entrenchment and enforcement issues and problems satisfactorily and avoids at least some problems raised by rights-based theories.²⁴¹ The *Grootboom* and *TAC* decisions can support a needs-based approach to the protection of interests in this category, although the influence of these

238 See fn 50 above and surrounding text, and particularly De Villiers (2002) 18 *SAJHR* 321–349.

239 See fn 1 above and surrounding text. A good example of how existing notions of the protection of vested rights can be extended or supplemented through awareness of constitutional goals appears from recent case law. On the one hand, the Supreme Court of Appeal recently confirmed that statutory interferences with existing rights and remedies will only be enforced if the interference or amendment of existing rights appears explicitly or by necessary implication from the legislation: *Fedlife Assurance Ltd v Wolfaardt* [2002] 2 All SA 295 (SCA). On the other hand the Supreme Court of Appeal confirmed a decision of the High Court in which the new constitutional recognition of a class action (s 38) was employed to extend existing remedies of welfare recipients who had been deprived of their benefits by the state: *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzo* 2001 (4) SA 1184 (SCA), confirming the decision of the Eastern Cape High Court in 2001 (2) SA 601 (ECD). Similarly, in *Mahambehala v MEC for Welfare, Eastern Cape* 2002 (1) SA 342 (SEC); *Mbanga v MEC for Welfare, Eastern Cape* 2002 (1) SA 359 (SEC) the High Court granted back pay of welfare benefits, plus interest, in cases of unduly long delay in the processing of welfare applications, instead of leaving it to the beneficiary to claim damages at common law.

240 Such as De Vos’s equality theory. Dignity should be a central issue here, but then as it features in Michelman’s needs-based theory and not in De Vos’s equality-based theory of dignity. See the sections on Michelman’s jurisprudential argument and on De Vos’s rights-based equality argument above.

241 See the sections on Michelman’s jurisprudential, moral, procedural fairness and interpretivist arguments above.

decisions could be restricted by unnecessarily formalistic interpretations.²⁴² At the moment the South African Constitutional Court seems to waver between a fairly thin rationality approach²⁴³ and a more expansive and substantive approach²⁴⁴ to judicial review, and it is still unclear when the substantive approach will be deemed suitable.

However, in the *Grootboom* and *TAC* decisions the Constitutional Court applied a stricter level of scrutiny that suggests the kind of substantive approach that can create space for a transformation-oriented and context-sensitive needs-based interpretation and enforcement of the constitutional provisions that protect social and economic rights. At the very least the Court's needs-based point of departure seems to steer these decisions away from thin rationality review and towards a more substantive reasonableness review that can support the promotion of social and economic transformation in a meaningful way. The most important aspect of these decisions to be explained on the basis of a needs-based theoretical approach is probably their threshold orientation, which casts reasonableness review in a framework that subjects normal efficiency and rationality review of government programmes and economic or equality balancing of conflicting claims on restricted resources to the threshold requirement of providing for extreme need and emergency requirements first.

When developing the needs-based facet of a theory of social and economic rights, it is necessary to consider theoretical critiques that highlight the dangers of reinforcing and exacerbating existing divisions between rich and poor, strong and weak, and so on. In this regard, CLS critiques of rights theory and of rights discourse, as well as post-CLS discourse analysis and gender/race critiques should be taken into account to highlight and address some of the problems related to rights-based and poverty-based theories respectively.²⁴⁵ Generally speaking, the central characteristic of arguments pertaining to interests in this sphere is that social and welfare benefits are granted without any reference to vested or acquired rights, purely on the basis of extreme need or emergency. However, that should not imply that those who are in extreme need rely on one kind of logic and one kind of theoretical approach, while all other interests are served by a different logic and theoretical approach.²⁴⁶ Instead, the relationship between the needs-based and the rights-based arguments should be seen strictly within the threshold image of Michelman's argument: any consideration and any balancing of conflicting claims on limited resources only enters the picture once the basic, minimum insurance requirements of everybody have been ensured, and after that the same basic principles and theoretical approaches apply across the board. The recent initiative of the South African government with regard to provision of clean drinking water provides an example: every household is entitled to a basic minimum of clean water, free of charge, after which everybody pays for the additional water they use on a sliding scale. This treats everybody's needs according to the same logic, but subject to a minimum threshold requirement, thereby establishing a non-disjunctive, non-exclusionary, non-oppositional relationship between needs and rights.

242 In *Bel Porto School Governing Body v Premier of the Western Cape* 2002 (3) SA 265 (CC) (see fn 51, 66ff above and surrounding text) par [46] Chaskalson CJ for the majority rejected an argument that relied on extending the *Grootboom* interpretation of reasonableness beyond the scope of s 26 of the Constitution.

243 *Soobramoney* being the most obvious example, see fn 53 above and surrounding text. Another example that differs in detail but not really in sentiment is *Kyalami*, see fn 172 above and surrounding text. The most recent example of this approach is *Bel Porto*, see fn 66 above and surrounding text, as well as the previous fn above.

244 The most obvious case being the *Bel Porto* minority's interpretation (see fn 241 above) of the *Grootboom* decision (see fn 1 above and surrounding text, fn 197 above and surrounding text).

245 See fn 199–200 above.

246 My colleague Lourens du Plessis, who alerted me to this danger, refers to it as 'theoretical apartheid'.

(iii) Middle Ground: Neither Extreme Needs Nor Recognised Rights

The third category is perhaps the most interesting one to discuss by way of conclusion, since neither Michelman's needs-based theory of minimum welfare nor the rights-based theories of legitimate expectation or vested rights provide suitable explanations for the protection of interests in this category. Equality and economic rationality arguments may have a significant impact in this sphere, although they should be qualified by the notion of socio-economic transformation in our Constitution.

The land reform process and experience with adjudication of land reform legislation could be a valuable source of inspiration and ideas in developing a transformation-sensitive theory about the protection and enforcement of rights in this category. Land reform is related to socio-economic reform in the Constitution, and perhaps approaches, explanations and theories developed and used in land reform can solve some of the enforcement problems and offer a theoretical explanation for the enforcement of socio-economic rights in this category. The link between the two situations appears from a comparison of the three categories of land reform identified in South African law (restitution of land rights, tenure reform, and redistribution of land) with the three categories of rights and interests in social and economic reform distinguished in this essay (acquired and vested rights, interests arising from extreme need, and interests based neither on existing rights nor on extreme need). The following more or less random thoughts indicate the areas in which experience from land reform can enrich the development of social and economic rights.

The restitution of land rights²⁴⁷ proceeds on the assumption that previously existing rights that have been lost or destroyed through apartheid laws and practices should be restored or, if restitution is impossible or impractical, compensated. Similar considerations apply in the sphere of social and economic rights that are already recognised and protected as rights: rights-based theory and practice could be employed (and reinforced by legislation where necessary) to ensure the protection and enforcement of existing rights and restitution of lost rights. The point of departure could be that one is dealing with existing and recognised rights, which means that a rights-based approach and resort to rights-based remedies and strategies should be relied on and used when they provide effective and suitable results. Promulgation of new legislation and interpretation of legislation should accordingly be guided by the goal of entrenching recognition of existing rights and remedies for the protection of those rights or for the restitution (or compensation) of lost rights.

Tenure reform²⁴⁸ is a different category of land reform with a different purpose, inspired by the notion that certain interests in land are weak and insecure because of apartheid laws and

247 In terms of the Restitution of Land Rights Act 22 of 1994, authorised by s 25(7) of the Constitution (originally by subsecs 121–123 of the 1993 Constitution). On the interpretation of and approach to these provisions see AJ van der Walt 'Property Rights and Hierarchies of Power: A Critical Evaluation of Land-Reform Policy in South Africa' (1999) 64 *Koers* 259–294; 'Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land-Reform Legislation' 2002 *TSAR* 254–289; 'Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Critical Evaluation of Recent Case Law' (2002) 18 *SAJHR* 371–419. See further Theunis Roux (2002) 12 *Constitutional Forum* 41–51 for another example of an evaluation of decisions on social and economic rights that makes use of examples from land reform jurisprudence. For a similar argument on water rights see Victoria Bronstein 'Drowning in the Hole of the Doughnut: Regulatory Overbreadth, Discretionary Licensing and the Rule of Law' (2002) 119 *SALJ* 469–483.

248 In terms of various legislative measures such as the Development facilitation Act 67 of 1995, the Land Reform (Labour Tenants) Act 3 of 1996, the Communal Property Associations Act 28 of 1996, the Interim Protection of Informal Land Rights Act 31 of 1996, the Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; and authorised in terms of s 25(6) of the Constitution. See the previous fn above for secondary literature.

practices, and that these interests need to be strengthened and bolstered through legislation to lift them above the threshold where they would enjoy legal recognition and protection. Again, similar considerations apply to social and economic interests that are weak because of pre-transformation laws and practices, particularly in the category where needs-based theory is or can be applied to inspire and justify initial awareness of and concern about the position of certain individuals or groups. Experience of land reform suggests that needs-based awareness and recognition of interests in this category should be bolstered by suitable legislative support that can transform the inherently weak nature of these interests in order to lift them above the threshold of minimum protection. In this case, legislation and interpretation should be guided by the notion of creating or improving security to ensure that beneficiaries are lifted above what is considered the minimum threshold of welfare benefits (housing, access to health services and education, social welfare) that is commensurate with the state's constitutional obligations.

Redistribution of property²⁴⁹ is a more extensive programme aimed at extending access to land and land rights, mostly through various state-sponsored programmes involving state subsidies, grants and incentives, but including a number of legislative provisions relating to land and housing development. This programme compares to state-sponsored and initiated welfare and social security programmes involving the provision of access to various categories of welfare or social security payments, grants and services.²⁵⁰ In this category, the promotion of social and economic rights can again benefit from experience in the land reform context, particularly as far as the reflexive transformative effect of adjudication is concerned.²⁵¹ In this area, the guiding notion for legislation and interpretation should be improving general access – above and beyond the minimum threshold – to social and economic welfare resources such as housing, health care, education, and social welfare, in line with the state's constitutional obligation to ensure the progressive realisation of social and economic rights. Policy with regard to the distribution of relatively scarce resources and considerations of economic efficiency and rationality will play a larger role in this sphere than in the other two.

Given the current approach of the Constitutional Court, it should be possible to translate the interpretation strategy proposed here into the form of a theory of rationality review that allows for different levels of scrutiny in determining whether government policy in the progressive realisation of socio-economic rights is reasonable. Insofar as this implies that the level of scrutiny is stricter when the interests of the most marginalised members and groups in society are affected, or when real emergencies and extreme need are at stake, while less strict scrutiny could be used when the government's economic decisions with regard to distribution of relatively scarce resources are involved, such a translation should not pose insurmountable or fundamental challenges to the approach I propose in this essay. In fact, this could provide the basis for interpretation and explanation of existing Constitutional Court decisions in the area of social and economic rights.

249 In terms of various legislative measures such as the Development Facilitation Act 67 of 1995, the Housing Act 107 of 1997 and (particularly) various state-sponsored subsidies and grants; see Van der Walt (1999) 64 *Koers* 259 (fn 236 above) 275 fn 31; and authorised by s 25(5) of the Constitution. See fn 236 above for secondary literature.

250 For information see further EML Strydom (ed) et al *Essential Social Security Law* (2001) chaps 2–9.

251 Van der Walt (2002) 18 *SAJHR* 371–419 (see fn 236 above) suggests that case law dealing with evictions under the constitutional and land reform guarantees could have a reflexive transformative effect by undermining the common law strength of landownership and bolstering the security of previously insecure occupation interests.

The interpretation of Michelman's theory of social justice set out in this essay could also be applied in a different way. Thomas J Bollyky²⁵² proposes an analytical model in terms of which the decision whether or not to grant a judicial remedy of a socio-economic rights violation (and whether to grant a remedy in the form of declaratory or mandatory relief) could be based upon judicial balancing of the extent of the constitutional violation involved and the extent of the policy and budgetary choices implicated by granting the required remedy. The balancing process is described by Bollyky in the algebraic formula 'R if $C > P + B$ ', where R refers to the desired remedy, C to the (quantitative and qualitative) extent of the constitutional violation, P to the level of policy interference and B to the level of budgetary interference required or implicated by the remedy. Leaving the merits of Bollyky's proposal aside for the moment,²⁵³ it seems possible to find a useful overlap between that model and this essay, in the sense that Michelman's theory concentrates on need or the extent of the constitutional violence (C in Bollyky's model). When the kind of extreme or emergency need is present that would activate Michelman's theory of absolute need and minimum protection, one should therefore assume that C is probably very high, and then R should be possible despite greater values of P and B. In the absence of absolute need or emergency, socio-economic support often relies purely on government policies and programmes relating to the distribution of scarce resources, and then it could be assumed that R should not be possible when the values of P and B are high. Finally, when it is possible to defend or protect the complainant's interests on the basis of vested or acquired rights, the balancing act proposed by Bollyky will either assume a different complexion, or it may not be applicable or useful at all, especially if discrete constitutional rights such as property²⁵⁴ or equality²⁵⁵ or administrative justice²⁵⁶ are involved. In this perspective, the Bollyky model and the current interpretation of the Michelman theory can be seen as mutually enriching rather than conflicting.

(f) Concluding Remarks

What is the value of Frank Michelman's theory of minimum welfare for South African readers? In the final analysis I would locate its greatest value in two related but very different places.

First of all, Michelman's theory is a timely and valuable reminder of our moral, political and constitutional-legal obligations towards the poorest, weakest, most marginalised members of the new constitutional democracy. The theory of minimum welfare reminds us of the strong links between the welfare of the most needy citizens and the welfare of the constitutional democracy as a whole – by neglecting the one we threaten the survival of the other. In this context, Michelman's theory illustrates the absolute and non-negotiable nature of the

252 Bollyky 'R if $C > P + B$: A Paradigm for judicial Remedies of Socio-Economic Rights Violations' (2002) 18 *SAJHR* 161–200.

253 The model is not restricted to remedies of socio-economic rights violations particularly, but has wider import, as is suggested by Bollyky's reference to and reliance upon illustrative cases from other areas of constitutional adjudication. This is underscored by the specific desire to propose a model that can eliminate 'rights apartheid' by allowing judicial redress for violations of socio-economic rights on a similar basis as redress for violation of other rights: Bollyky (2002) 18 *SAJHR* 161 (previous fn) 164.

254 It is highly unlikely that Bollyky balancing will work in the property framework of s 25 of the Constitution, although closer scrutiny might suggest ways in which the model could be used to enrich the current theory.

255 In established equality jurisprudence Bollyky balancing might either be unnecessary or of limited value.

256 In the case of administrative justice Bollyky balancing might actually also be useful, but the model will have to be worked out with the specific requirements and problems surrounding s 33 of the Constitution and especially the Promotion of Administrative Justice Act 3 of 2000 in mind to determine the possibilities and restrictions.

constitutional duty to lift social and economic welfare above a minimum threshold vividly and convincingly. South African readers cannot afford to ignore or underestimate this lesson, which is one of the central features of the new constitutional dispensation.

Secondly, Michelman's theory is a source of inspiration for South African theorists who are interested in social and economic rights. The theory of minimum welfare embodies and illustrates the theoretical rigour and creativity that is required of South African readers who want to contribute to the development of social and economic welfare under the new constitutional system. It inspires further thinking and creates the energy to look for new ideas and creative solutions, and it demands critical thinking and careful evaluation of every theory and its application. And, above all, it demonstrates the benefits of an open, flexible, multi-stranded but nevertheless morally and politically sensitive theoretical approach to constitutional adjudication.

JOHAN VAN DER WALT

FRANKLY BEFRIENDING THE FUNDAMENTAL CONTRADICTION: FRANK MICHELMAN AND CRITICAL LEGAL THOUGHT

I BY WAY OF INTRODUCTION: MICHELMAN VIS-À-VIS HABERMAS AND ROSENFELD

Frank Michelman offers us the following take on Jürgen Habermas: Habermas seeks to derive a-priori binding normative principles from linguistic principles of communicative action, thus denying that the linguistic turn in the social sciences and the humanities subverts all talk of universal normative criteria. Habermas claims the normative principles that he infers from his theory of communicative action are strictly procedural in character and therefore not in conflict with any substantive value system. All substantive value systems can therefore endorse these normative principles without compromising any substantive value. Moreover, all value systems should endorse these normative principles because they are intrinsic to the communicative aspirations on which these value systems themselves rely to the extent that they wish to be understood and, by implication, to be taken seriously.¹

Michelman's response to this discourse theoretical foundation of universal normativity is this: The communicative principles that Habermas invokes to found a universal normativity derive from a language or a culture in which honest rational argument is valued as a substantive ethical principle. Habermas is wrong to believe that he can rid the procedural normativity that he derives from the theory of communicative action of substantive normative values.²

Michelman's analysis of Habermas's discourse theoretical project clearly creates a serious problem for the idea of a constitutional patriotism that Habermas develops in *The Inclusion of the Other: Studies in Political Theory* (1998). The idea relates to the conviction that constitutional principles can unite a multicultural nation politically, notwithstanding the divergent substantial ethical convictions endorsed by the various peoples of that nation. The principles can affect this political union, the conviction holds, because they are strictly procedural. They do not compete with the substantive ethics embodied by any of these cultures. This also applies to questions of application. The procedural nature of the contracting principles also elevates the application of these principles in cases of concrete social disputes to a level of deliberation to which substantive considerations informing these disputes themselves do not reach.³ However, if Michelman's analysis of Habermas's discourse theoretical project is correct, as I believe it is, constitutional principles and the deliberation that informs their application in concrete cases of

1 Cf F I Michelman 'Morality, Identity and "Constitutional Patriotism"' (1999) 76 *Denver University LR* 1009, 1011–1014.

2 Cf Michelman 'Morality, Identity and "Constitutional Patriotism"' (n 1) 1027.

3 Cf Michelman 'Morality, Identity and "Constitutional Patriotism"' (n 1) 1022–1023.

social dispute can never claim to be above the fray of these disputes. Constitutional principles cannot be invoked to solve the problem of serious political or social conflict that results from divergent substantive ethical values. They must be understood to be part and parcel of the problem.

Michelman offers us the following take on Michel Rosenfeld's book *Just Interpretations: Law Between Ethics and Politics* (1988): Rosenfeld develops a principle of *comprehensive pluralism* that he insists can be distinguished from the Kantian or procedural approaches to the resolution of conflict in multicultural societies of which Habermas and Rawls are currently among the most eminent exponents. Rosenfeld offers his principle of comprehensive pluralism as a substantive normative value that does indeed compete with other substantive normative values.⁴

Rosenfeld's argument can be summarised thus: Homogeneous societies are not subject to the problem of just legal interpretation. The problem of just interpretation arises with the knowledge regarding the *purely* (just) interpretative status of legal deliberation, which inevitably gives rise to questions regarding the legitimacy (justness) of such interpretation. This knowledge, however, only arises in heterogeneous or multicultural polities. The deep cultural consensus of homogeneous societies keeps those societies sufficiently oblivious to the purely interpretative and therefore contentious nature of legal deliberation. The crisis that legal interpretation faces today concerns the loss of innocence regarding the fact and legitimacy of interpretation in postmodern societies.⁵

Rosenfeld contends, in stark contrast to Habermas, that constitutional principles are not exempted from the conflict or contest of interpretations in postmodern societies. This applies to even the most abstract or general of constitutional principles that at first glance can hardly be conceived to be subject to serious disputation. The reason for this, Rosenfeld claims, relates to the inevitable descent into the concrete and the specific concomitant to the application of these general principles. This descent destroys the appearance of consensus regarding general constitutional principles. According to Rosenfeld, postmodern societies cannot lay claim to any general procedural rules with which social conflict can be resolved incontestably.⁶

I shall not deal with Michelman's acute analysis of Rosenfeld's claim that the principle of comprehensive pluralism is a substantive and not a procedural principle; not a principle of the right, as Rawls would have it, but a principle of the good.⁷ My concern here is with Michelman's 'deconstruction' of Rosenfeld's notion of 'crisis'. Given my understanding of the term deconstruction, I shall always be inclined to understand the 'of' in the phrase 'deconstruction of Rosenfeld's crisis' as a subjective genitive (deconstruction belongs to the crisis). What follows is a suggestion that Michelman understands the genitive as purely objective (crisis is the object of his deconstruction).

Michelman *frankly* argues that the descent into conflict and contestation that ensues whenever general principles (that initially appear to sustain consensus) require concretisation or application is not a new disease. The descent is not exclusive to postmodern societies. It is a 'chronic affliction', 'like mice in the attic', 'at least as old as the house of constitutional

4 Cf FI Michelman 'Modus Vivendi Postmodernus? On *Just Interpretations* and the Thinning of Justice' (2000) 21 *Cardozo LR* 1945, 1946.

5 Michelman 'Modus Vivendi Postmodernus?' (n 4) 1947–1949.

6 Michelman 'Modus Vivendi Postmodernus?' (n 4) 1951–1952.

7 Michelman 'Modus Vivendi Postmodernus?' (n 4) 1962. The question that Michelman asks in this regard is this: 'How can comprehensive pluralism's demand for placing all conceptions of the good on an equal footing prevail over rival ethical claims, given that its call is after all, to place all conceptions of the good on an equal footing?'

government'.⁸ 'It is a condition', moreover, 'that history and experience tell us is manageable without tears'. '(Got mice? Get a cat and learn to like it.)'⁹

Let us retrace our (Michelman's) steps thus far. *Michelman vis-à-vis Habermas*: Oh no, you do not solve the substance/procedure question just like that. Your transcendentalism gets us nowhere. Your procedural rules are substantive themselves and their application makes matters worse. Constitutional patriotism cannot relate to a universal norm. It is a contingent matter and as such fraught with the *crises* of contingency that informs all political or social conflict. *Michelman vis-à-vis Rosenfeld*: This is however not *a crisis*. Crises, perhaps, but only if we understand their numerousness to diminish their impact. Crises, yes, many of them, indeed 'a chronic affliction', but not *a crisis*. 'Manageable without tears.'

Habermas would appear to make life too easy. Rosenfeld would appear to make it more difficult than it really is. But let us begin to question Michelman in this regard. Is it not a cause for grief, for some at least, when the highest judicial authority of a country decides that 'separate' does not equal 'unequal'?¹⁰ Is it not a cause for joy, for some at least, when that same judicial authority later decides it does?¹¹ I would imagine tears of some sort, tears of joy or of grief, on the faces of those whose lives were directly affected by these momentarily conflicting applications of the general principle of equal protection.

Is it not a reason for tears, for someone at least, when the highest judicial authority of a country decides (correctly, I could concede, but this is besides the point) that the constitutional right to life does not entail a right to the prolonging of life, in any case not when this requires the state to provide expensive medical treatment to a person who cannot benefit from it as much as less sickly people would?¹²

Are these interpretations of the principles of equal protection and the right to life causes for tears? Not necessarily, as I shall contend, in some sort of agreement with Michelman, towards the end of this essay. For now, however, let us bear in mind that there are two very different modes of tearfulness: Weeping *and* laughing. And this would suggest that my concern with Michelman's reference to 'manageable without tears' may, but does not necessarily relate to weeping.¹³ At issue, in any case, is much rather the experience of a limit whenever tears issue from either weeping or laughter. Weeping and laughter, contends Plessner, constitute quite rational responses to extreme or 'limit' experiences of which we cannot make sense. Plessner refers to laughing and crying as *Grenzreaktionen*.¹⁴

Michelman, vis-à-vis Habermas, does not underestimate the difficulty and contentiousness of constitutional interpretation. But he would seem, vis-à-vis Rosenfeld, to exempt the trials and tribulations of constitutional theory from the experiences of the limits of understanding to

8 Michelman 'Modus Vivendi Postmodernus?' (n 4) 1953.

9 Ibid.

10 *Plessy v Ferguson* 163 US 537 (1896).

11 *Brown v Board of Education* 347 US 483 (1954).

12 *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC).

13 John Caputo's understanding of deconstruction in view of Derrida's tears (cf Caputo *The Prayers and Tears of Jacques Derrida* (1997) should always be tempered with the following reference to Nietzsche's *Übermensch*: 'He burns his text and erases the traces of his steps. His laughter then will burst out, directed toward a return which no longer will have the form of the metaphysical repetition of humanism. ... He will dance, outside the house, the *aktive Vergesslichkeit*, the active forgetting and the cruel (*grausam*) feast of which the *Genealogy of Morals* speaks.' Cf J Derrida *Margins of Philosophy* (1982) 136.

14 Cf O Marquard 'Vernunft als Grenzreaktion. Zur Verwandlung der Vernunft durch Theodizee' in H Poser (ed) *Wandel des Vernunftbegriffs* (1981) 107.

which Plessner refers. For Michelman, these trials and tribulations are manageable without tears. Let us take a closer look whether and/or to what extent this is really the case.

II THE LIMITS OF CONSTITUTIONAL INTERPRETATION

Having been asked to respond to the question whether human rights need democratic legitimation and having considered several possibilities of what the question may mean, Michelman takes it to ask whether an ‘actual practice of human-rights recognition in the subsisting legal reality of one or another country’ is in need of normative democratic legitimation (and not mere empirical social acceptance).¹⁵

Ultimately, he also takes the question to be about the normative democratic legitimacy of ‘an established political regime that includes a set of human-rights interpretations’. It cannot be about the normative democratic legitimacy of *an abstract concept of human rights*, since the answer to this question is so clearly ‘no’ that the question becomes a non-question. The legitimacy of an abstract concept of human rights (in terms of some a priori essence) would have to be democracy-independent. The legitimacy of an abstract concept of human rights would have to turn on the application of intellectual or analytic competence to the question whether the abstract and general content of human rights finds sufficient concretisation in a particular country at a particular time. It cannot turn on a procedural democratic legitimation. In other words, ‘human rights’ would need to relate to some institutional setting or actual legal dispensation of human rights to become exposed at all to procedural democratic legitimation.¹⁶

Michelman’s response to the question whether an actual legal dispensation of human rights can receive democratic legitimation again discloses a remarkable *frankness*. Frank Michelman’s argument proceeds as follows:

[Any] ... legal entrenchment of a specified set of rights must always be liable to controversy in a modern, plural, democratic society ... To take just one of many obvious examples: Insofar as constitutional law makes everyone secure in the retention of his or her existing property entitlements, various harms and deficiencies of life that are suffered by the relatively propertyless may become uncorrectable in either ordinary judicial forums or ordinary channels of politics and legislation.¹⁷

[This] endemic controversiality of basic rights entrenchments is a particular manifestation of a more general truth: Any established political order, constituted by a set of fundamental laws, contains an irreducible element of coerciveness vis-à-vis what everyone in the (broadly speaking) liberal tradition would hold to be the ideally and primordially free and equal individual within the range of its authority. Many liberals accordingly say that in order for this coercion to comport with justice, it must be the case that everyone subject to the regime has (and ought to recognize) prevailing reasons of his or her own for agreeing to its terms. If so, then any basic-right entrenchment or constitutional bill of rights, in order to comply with justice, must respond directly to reasons of their own that everyone truly has, although (we may allow) not everyone may be conscious of having them – reasons, say, that everyone, hypothetically, *would* be brought to recognize in a proper normative discourse.¹⁸

15 FI Michelman ‘Human Rights and the Limits of Constitutional Theory’ (2000) 13 *Ratio Juris* 65.

16 Michelman ‘Human Rights’ (n 15) 66–67.

17 Michelman ‘Human Rights’ (n 15) 69–70.

18 Michelman ‘Human Rights’ (n 15) 70.

This evidently discourse ethical or Habermasian understanding of the possible legitimization of the inevitable coerciveness of any legal enforcement of human rights, argues Michelman, again relates the question regarding the democratic legitimization of human rights to the correct interpretation of ‘universal human rights’ and questions of ‘true justice’. It concerns the question of *conceivably* universal legitimization, a question that can be dealt with conceptually and analytically, but it does not address the question as to whether the conditions exist under which those actually coerced by a particular human rights regime will accept the coercion as legitimate. The notion of ‘conceivably universal legitimization’ does not address the question whether those actually coerced have reason to abide by this ‘conceivably universal legitimization’ and therefore accept the coercion as legitimate. Speaking frankly, they may well be informed by another ‘conceivably universal legitimization’ for coercion that they *in fact* seriously prefer to the one offered by those enforcing the coercive system of human rights.

Michelman invokes in this regard the notion of *a reasonable interpretative pluralism*. By this he means

the fact of irresolvable uncertainty and, in real political time, irreparable reasonable disagreement among inhabitants of a modern country about the set of entrenchments and interpretations of human rights – the dispensations with regard to private property rights, for example – that would truly satisfy justice in the country’s historical circumstances.¹⁹

Reasonable interpretative pluralism must be distinguished clearly from the Rawlsian notion of *a reasonable pluralism of comprehensive views*. The latter refers to the Rawlsian belief that the legitimacy of coercive human rights regimes can be more or less ‘complete’ in the sense that ‘almost all questions regarding applications of [essential basic rights entrenchments] or at least their “central ranges”, can be resolved cogently, by reasoned arguments referring to values publicly known to underlie the constitution’.²⁰ Thus understood, Rawls’s reasonable pluralism of comprehensive views would claim to contain the subversion threatened by Michelman’s reasonable interpretative pluralism. Such a claim, if valid, argues Michelman, would ‘doom’ the attempt to explain how democratic procedures might confer normative legitimacy on a particular country’s human rights jurisprudence. He therefore simply proceeds to assume that the claim is not valid. ‘I want, therefore to suppose here that reasonable interpretive pluralism is quite broadly and strongly true.’²¹

It is surprising that Michelman’s responses to Rawls and Habermas should be so different. It is strange that he should think that Rawls’s claim regarding *a reasonable pluralism of comprehensive views* holds a threat to his (Michelman’s) endeavour to explain the democratic legitimization of human rights in a way that Habermas’s discourse theory does not really do. Both Rawls and Habermas argue that legitimization *is possible* (at least broadly possible and hence relatively complete in the case of Rawls) based on reasoned argument. The difference between Rawls and Habermas in this regard would seem to turn only on the degree of counterfactuality that they rely on and the comprehensiveness they claim for their reasoned argumentative legitimization. Habermas offers us a *completely* counterfactual (beyond all real social conflict) view of legitimization that quite understandably can claim to be fully comprehensive. Rawls offers us only a *largely* counterfactual (beyond most real social conflict) model of legitimization, which quite understandably must concede not to be fully comprehensive. He must restrict his view of legitimization to ‘almost all [jurisprudential] questions’ or at least ‘their central ranges’.

19 Ibid.

20 Michelman ‘Human Rights’ (n 15) 71.

21 Ibid.

But this does not alter the fact that both Habermas and Rawls place the problem of legitimation beyond or outside 'real political time', to use Michelman's most apt phrase. Rawls's lesser degree of counterfactuality does not mean that his understanding of legitimation puts it back into 'real political time'. If I am correct in this regard, Michelman can and should respond to Rawls in the same way he does to Habermas. He need not only *assume* for purposes of his project that reasonable interpretative pluralism holds truer than reasonable pluralism of comprehensive views. He has a more cogent response available:

Both Rawls and Habermas address the question of legitimacy from a perspective of consensus that renders redundant and meaningless the question why those coerced by a legally enforced human rights dispensation should accept that coercion as legitimate. Why? Because coercion is not possible *within* the parameters of consensus, be this consensus completely counterfactual (as in the case of Habermas) or only largely so (as in the case of Rawls), be it absolute or less so (comprising all or only *most* questions or only their 'central ranges'). Whenever liberal political theorists invoke some kind of consensus (universal or just broad, counterfactual or not) to address the question of political legitimacy (the problem of coercion), they do not resolve the question. They deny it. The questions of coercion and legitimacy only arise in the absence of consensus. Or rather, they arise as an absence of consensus. The questions of coercion and legitimacy mark the absence of consensus. They are defined by the absence of consensus. And so is *real political time*. The reasoned consensus with regard to most jurisprudential questions or at least their central ranges that Rawls invokes, may well be or become a fact that can be verified to be more or less present in a particular country. As such it may well contain the problem or rather reflect the contained nature of the problem of reasonable interpretative pluralism in that country. As such, however, it would also reflect the limited or contained scope of real political time in that country. The wider the scope of Rawls's reasonable pluralism of comprehensive views in a particular country or other institutional context, the narrower would be the scope of real political time in that country or institutional context.

The acknowledgement of the existence of a Rawlsian reasonable pluralism of comprehensive views in a particular institutional context would therefore not doom Michelman's concern with political legitimation. It would certainly marginalise it, and this may well be the point of Michelman's difference with Rawls. He certainly wishes to contend that lack of reasoned consensus or reasonable interpretive pluralism is a more widespread problem in multicultural societies than Rawls is prepared to accept. However, the marginalisation of the concern with political legitimation is neither surprising nor threatening to that concern. This is so for two reasons. Firstly, the political is conceptually and practically a marginal phenomenon. (If one is interested in finding a more ubiquitous or less marginal manifestation of legitimation, one should look towards economics). Secondly, the political concern is fundamentally a concern with and a matter of the margins registered by coercion and a lack of consensus. To refer to and elaborate on Hannah Arendt's words in this regard: Plurality is the condition of and for the political.²² Political plurality, however, does not simply turn on numerosness. It turns on the difference that constitutes number in the first place. To deny difference, for instance by invoking reasoned consensus (absolute or relative), is to erase the plurality and the *marginality* (belonging to margins) of the political. Real political time can therefore not be a concern for Rawls. The *centring* of a response to the question of legitimation *within* the parameters of a reasonable overlapping consensus (however thick or thin) regarding jurisprudential questions,

22 H Arendt *The Human Condition* (1989) 7.

disqualifies it from taking part in a *political* theory of legitimation.²³ I cannot see how a theory of legitimation (however empirically substantiated) that disqualifies itself from political theory, can doom a political theory of legitimation.

The plausibility of Michelman's political theory of legitimation does therefore also not turn on the empirical substantiation of lack of consensus in multicultural societies, however empirically substantiated this lack of consensus patently is. It turns on the degree to which he allows the margins of dissent (however thick or thin) to take centre stage in his theory. It turns on the extent to which he, in contrast to Rawls and Habermas, invokes the experience of the limit as the central question of legal and political legitimation. And it is with regard to this degree or extent that I shall argue that a certain frankness *appears* to diminish the concern with the limit in Frank Michelman's thought. I stress the word 'appear'. The diminishing may indeed be more apparent than real and the goal of this essay is to explore the extent to which margins of dissent *really* inform Michelman's writings. But let us first turn to his argument regarding democratic legitimation of coercive human rights regimes and reasonable interpretive pluralism.

According to Rawls, argues Michelman, 'the fact of reasonable pluralism of comprehensive ethical, religious, and philosophical views ... may give people reasons that they might not otherwise have for accepting entrenched norms of toleration'.²⁴ 'The fact of reasonable *interpretive* pluralism' on the other hand, 'cuts deeper'.

To assert this fact is to declare impossible a publicly reasoned demonstration of the truth about what it is that everyone has reason to agree to in the matter of legal human-rights entrenchments and interpretations. Reasonable interpretive pluralism does not place this matter beyond reasoned argument, or make it just a matter of opinion or desire or power, it makes it *politically* unavailable, in real political time among people who, aware of human frailty and 'burdens of judgment,' all perhaps sharing belief that here is a truth of the matter, can neither all agree on what that is nor dismiss as unreasonable their opponents' positions.²⁵

Michelman explains 'burdens of judgment' in a footnote:

John Rawls calls 'burdens of judgment' the causes of unliquidatable disagreement about justice among persons who, as reasonable, all observe and report honestly, argue cogently, and 'share a desire to honor fair terms of cooperation'. Among these causes Rawls lists the likelihood that 'the way we assess evidence and weigh moral and political values is shaped by our total experience, our whole course of life up to now; and our total experiences must always differ. Thus, in a modern society with its numerous offices and positions, its various divisions of labor, its many social groups and their ethnic variety, citizens' total experiences are disparate enough for their judgments to diverge, at least to some degree on many if not most cases of significant complexity.'²⁶

I quote Michelman and Rawls extensively here to show how incisively they both grasp the problem of social dissent in contemporary societies. The remarkable thing in this regard is Rawls's clear suggestion (discussed above) that the vast and irreducible source of dissent in contemporary societies need not affect jurisprudential legitimation of coercion. The law is

23 According to Michelman, Rawls's position may ultimately not differ much from his claim that 'reasonable interpretive pluralism is quite broadly and strongly true'. Cf Michelman 'Human Rights' (n 15) 71 n. 8.

24 Michelman 'Human Rights' (n 15) 71.

25 Ibid.

26 Michelman 'Human Rights' (n 15) 71 n 9 referring to J Rawls 'The Idea of Public Reason Revisited' in *Collected Papers* (1999) 57.

somehow mostly above the fray of inevitable social dissent. This is the point where Michelman begins to deviate from Rawls. He believes that any legal enforcement of human rights dispensations necessarily involves us in the fray of the irreducible social dissent asserted by reasonable interpretive pluralism. As such, reasonable interpretive pluralism ‘thus opens a gap between the question of true justice in politics and the question of what it would be ... justifiable for anyone to be doing about the matter of political coercion.’²⁷ In other words, the legal enforcement of a human rights dispensation confronts us with a gap between justice and justification. This would seem to be another (perhaps less frank?) way of stating (as I have done elsewhere in co-authorship with Henk Botha), that constitutional jurisprudential justification necessarily takes place with reference to unjust grounds. Our justifications for legally enforcing a human rights dispensation are necessarily unjust.²⁸

This is, however, not necessarily what Michelman is saying. He could be arguing that the gap between justice and justification to which he refers also implies a gap between justification and injustice. To the extent that justification cannot take place with reference to justice, it cannot be related to injustice either. He could be saying that we would have to understand what justice is to understand the injustice of justification. But this is doubtful, for that would imply that he does not see injustice taking place with the *coercive legal enforcement* of a human rights dispensation against the wish of someone that does not understand the dispensation to be just. We may not be able to deem the substance of an enforced legal dispensation just or unjust, but the enforcement of a ‘neither just nor unjust’ legal system can be said to make it ‘unjust’. I do not think Michelman would fail to ‘sense’ the injustice of forcing someone to comply with a legal order that he or she does not agree to be just, especially when one has already conceded that he or she has an equal right to interpret the status of that legal dispensation.²⁹ And if this is the case, we could proceed to understand the question to which he finally turns thus: How can the unjust enforcement of a coercive human rights dispensation be legitimate? How can this unjust enforcement of a coercive legal system be worthy of our ongoing respect?

The crucial aspect of the answer that Michelman offers to this question is thoroughly Habermasian: A coercive legal system can only be worthy of ongoing respect if there is ‘institutional provision for their constant submissiveness to an adequately democratic and influential discursive process of critical re-examination.’³⁰ But Michelman also knows well that

27 Michelman ‘Human Rights’ (n 15) 71.

28 Cf JWG van der Walt & H Botha ‘Democracy and Rights in South Africa: Beyond a Constitutional Culture of Justification’ (2000) 7 *Constellations* 353–355.

29 In other words, I am subscribing to and ascribing to Michelman a similar subscription to what would *appear* to constitute a certain logical impossibility: It is politically unjust to coerce someone to submit to a political decision when we cannot assess the justness or unjustness of political decisions. Michelman, we shall see further on in the text above, in the somewhat different but closely related context of the regulative idea, denies that there is anything illogical about doing what cannot be done. Michelman, to be sure, phrases his proposition regarding the regulative idea in a way that does seem to allow some escape from the illogical. He says that there is nothing illogical about doing something that *cannot be shown* to be done. Cf the quote at n 35 below. Strictly speaking, however, the Kantian notion of the regulative idea does relate in fact to ‘doing what cannot be done’. This would also apply, I suggest, to saying what cannot be said. Strictly speaking, we can no longer talk cogently about justice or injustice in a postmodern or postmetaphysical age, but the realisation that some of us will inevitably carry the burden of our inability to talk about justice and injustice does confront us with a ‘sense’ of injustice and the sense of justice concomitant to it. This may well be the gist of the Kantian insight. The critique of pure reasons no longer allows us the luxury of metaphysical knowledge, but it cannot rid us of the sense of the metaphysical. Something (perhaps it is the heart – cf n 77 below) persistently rebels against the statement that ‘it is simply non-just and not unjust that someone in particular should bear the burden of our inability to talk about real justice and injustice’.

30 Michelman ‘Human Rights’ (n 15) 74, referring to J Habermas *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (1996) 296.

this answer does not arrest the question. All democratic-discursive processes are themselves ‘inescapably legally conditioned and constituted processes’. They are constituted, for example, by the laws regarding political representation and elections, civil associations, families, freedom of speech, property, access to media, and so on.³¹ These processes themselves will therefore also have to be constantly submitted to ‘adequately democratic and influential discursive process of critical re-examination.’ Legitimacy or respect-worthiness can therefore clearly be seen to be subject to an infinite regress of critical re-examinations.³²

This leads Michelman to conclude: ‘In practice, no democratic discursive “legitimation” is finally possible for any empirically established set of human-rights interpretations for which we have reason to say that such legitimation is ‘needed’ in the first place.’ In other words, he concludes that we are in need of a legitimation to which we cannot attain. We are in need of doing something that we cannot do. This resonates strongly with the theoretical position from which I am engaging with Michelman’s thoughts on political legitimation. My reading has frequently run and still constantly runs me into statements like these: ‘Justice is impossible, but justice cannot wait.’³³ ‘If I only do what is possible, I do nothing. But the impossible, is it possible?’³⁴ These sentences have a way of depriving me of sleep that I need dearly. Frank Michelman, however, does not appear to be overly intrigued by this kind of statement. Consider the thrift of his response to them (and pick up on the close relation between thrift and frankness):

No logic excludes the possibility of there being something that is morally necessary to do, which we cannot ever finally know or show that we have done. We call such a thing a regulative idea.³⁵

Why do I again hear the question ‘[g]ot mice? ...’ behind this statement regarding the regulative idea?

Why does Michelman simply stop his inquiry into the limits of constitutional theory at this point? Why does he rest assured with the notion of a regulative idea? Why does the Kantian notion of a regulative idea appear to be a rather blunt response to the limits of constitutional interpretation? Can a response appear at all if it is to appear so bluntly? Why does it appear to be so faceless? Can a response appear at all if it is to appear so facelessly? Does it not require a face to appear, to come to the fore, as a response?

The problem at issue here would come to a head with Hegel’s arrest of the restless energy that Kant still sought to express with the notion of the regulative idea. As far as Michelman is concerned, it comes to a head with a certain Hegelianism in his thinking. But the problem already starts with Kant. It starts with the philosophical reduction of the other (the other as end in itself) to a procedural principle (the principle of universalisation) and ultimately to an endless process of subjective self-transcendence (as a regulative idea). The problem starts with philosophy. Lèvinas writes:

31 Michelman ‘Human Rights’ (n 15) 75. Cf also FI Michelman “‘Protecting the People from Themselves’ or How Direct Can Democracy Be’ (1998) 45 *UCLA LR* 1717–34.

32 Michelman ‘Human Rights’ (n 15) 76.

33 J Derrida ‘Force of Law – the Mystical Foundations of Authority’ 1990 (11) *Cardozo LR* 919, 967.

34 J Derrida ‘Débat: Une Hospitalité sans Condition’ in M Seffahi (ed) *Manifeste pour l’hospitalité* (1999) 141. More recently, when he received the Adorno prize, Derrida claimed that his work has constantly been concerned with the question of the possibility of the impossible and the implications of this impossible possibility for ethics, politics and the law. Cf J Derrida *Fichus* (2002) 19–21.

35 Michelman ‘Human Rights’ (n 15) 76.

Philosophy identifies itself with the substitution of ideas for persons, of the theme for the interlocutor, of the interiority of the logical relation for the exteriority of the interpellation.³⁶

This is where the scrutiny into the limits of constitutional interpretation should take us according to L  vinas: from the (regulative) idea to the encounter with the person that informs it, from the (general) theme to the interlocutor, from the internal logic of the relation to the exteriority of the interpellation. The logic of the regulative idea does not confront us with the margins of plurality. It reflects the consistent logic with which philosophy (or legal theory) internalises the insight into the differences that constitute otherness. This is the essential dynamic of the Hegelian dialectic to which Derrida responds following Bataille (in his early work) and L  vinas (in his later writings). The Bataillian and the L  vinasian Derrida confronts us with the disruptive encounter with the other as other, the encounter in which the other is not (at least not yet) reduced to the dialectical (or feudal) maintenance of the self.³⁷ If the limits of constitutional theory are to be thought of in terms of the ultimate impossibility of presenting theoretically or practically the legitimisation of coercive legal regimes, the legitimisation that would erase the word ‘coercive’ from this very phrase, the legitimisation that would fulfil the promise of political plurality and self-government that constitutional democracy holds, it needs to take issue with the impossibility of otherness that Derrida addresses so acutely and so tirelessly in his work. This encounter registers (if at all), Derrida tells us, not as presence but as *traces* of non-presence, as *ghosts*.³⁸ This is indeed what Michelman seems to be pursuing in his essay ‘Traces of self-government’:³⁹ *marking the traces of an always-absent self-government*. But this is not quite or not unequivocally the case. We shall return to this amazing text below. We shall see then that Michelman also seeks to sustain or resuscitate the presence of self-government from its traces, thereby risking the substitution of the presence of self-government for the traces of self-government. However, let us first trace further the Hegelian erasures of the trace in some of Michelman’s other writings.

III FRANKLY BEFRIENDING THE FUNDAMENTAL CONTRADICTION – MICHELMAN’S RETREATS FROM CRITICAL LEGAL THOUGHT

I have argued elsewhere that Duncan Kennedy’s notion of the fundamental contradiction constitutes the most radical engagement with the promise of plural liberties articulated by Kant’s definition of law.⁴⁰ Law, argued, Kant, consists of the conditions under which the external liberty of every person could be reconciled with the external liberty of everyone else.⁴¹

36 Translated from E L  vinas *Totalit   et Infini* (1971) 87: ‘La philosophie elle-m  me s’identifie avec la substitution d’id  es aux personnes, du th  me    l’interlocuteur, de l’int  riorit   du rapport logique    l’ext  riorit   de l’interpellation.’

37 I cannot go into the relation between the dialectic and feudal maintenance of the self here. For further thoughts on this, cf JWG van der Walt ‘The Future and Futurity of the Public-Private Distinction in View of the Horizontal Application of Fundamental Rights’ in *tangible mais intouchable, la loi du tact, la loi de la loi* (2002) 112; JWG van der Walt ‘Blixen’s Difference: Horizontal Application of Fundamental Rights and the Resistance to Neo-colonialism’ 2003 *TSAR* 311–328; 2003 *Law, Social Justice and Global Development Electronic Law Journal of the University of Warwick*.

38 Cf J Derrida *Spectres of Marx* (1994) xix.

39 FI Michelman ‘The Supreme Court 1985 Term Foreword: Traces of Self-Government’ (1986) 100 *Harvard LR* 1.

40 JWG van der Walt ‘Piracy, Property and Plurality: Re-reading the Foundations of Modern Law’ 2001 *TSAR* 524.

41 I Kant *Metaphysik der Sitten* in *Werke in 10 B  nden* (Weischedel edition 1983) VII 337.

Noteworthy in this definition is the externality of the liberties at issue in it, the exteriority of the encounter *between* liberties that is so markedly absent from the internal procedures of moral deliberation required by the categorical imperative.⁴² It is the exteriority of the encounter *between* liberties that Kennedy's fundamental contradiction reflects so fiercely and incisively. The fundamental contradiction registers the irreducible incongruity between the liberty of the self and the other.⁴³ This register, I maintain, is the most incisive engagement with plurality in the history of jurisprudence. The fundamental contradiction registers the irreducible experience that your liberty is not my liberty and my liberty is not yours. It registers the mutual dependence between liberties that threaten one another. By registering the interdependence of mutually threatening liberties, it recognises an irreducible conflict of liberties, that is, a conflict of liberties with which we cannot do away. We cannot do away with the conflict of liberties (we cannot endeavour to either annihilate or assimilate the threatening liberty of the other) because our liberty depends on the independent liberty of the other that gives rise to the conflict. The fundamental contradiction thus registers an irreducible plurality of liberties.

Michelman avers that he accepts the existence of the fundamental contradiction. He confirms it. Having done so, he takes a remarkable step. He befriends it:

That there is something like the fundamental contradiction deeply written into us, and that the result is a radically disunified legal discourse, is the truth, as I understand it. Yet ... Kennedy's diagnosis of liberal legal pathology rests on the claim that the contradiction is, for us, an experience fearful and painful. That is not how it seems to me. I think the contradiction is my friend; nay my self.⁴⁴

One could rephrase: 'Got a fundamental contradiction? Think properly (dialectically) and learn to really like it!'

Michelman is telling us that the threat posed by the other is more apparent than real. If we could see otherness for what it really is, we shall see that it is a blessing, not a threat. The encounter with otherness, he writes in 'Law's republic', is an opportunity for a 'transformative self-renewal'.⁴⁵ At issue is a certain revitalisation of the self through the encounter with the other. One should not ask what the other would think about being reduced to a source of revitalisation for others, because the other naturally also experiences (or should experience) others as sources of revitalisation. Thus otherness becomes the uniting factor between us. Otherness becomes the very thing that destroys otherness. Michelman writes in 'Traces of self-government' that difference is the common factor between us:⁴⁶

The human universal becomes difference itself. Difference is what we most fundamentally have in common.

Thus plurality falls by the wayside again in the grand march of unification that has now also absorbed difference.

This is vintage Hegel. There is no real trauma in the encounter between Spirit and Otherness. To be sure the *Phänomenologie des Geistes* tells us that spirit does not shy away

42 Cf Kant *Metaphysik der Sitten* (n 41) 318.

43 Cf D Kennedy 'The Structure of Blackstone's Commentaries' (1979) 28 *Buffalo LR* 213.

44 FI Michelman 'Justification (and Justifiability) of Law in a Contradictory World' in Pennock & Chapman (eds) *Justification: Nomos XXVIII* (1986) 92.

45 FI Michelman 'Law's Republic' (1988) 97 *Yale LJ* 1532.

46 Michelman 'Traces of Self-Government' (n 39) 32.

from the death and destruction that mark its history,⁴⁷ but it survives this history without retaining scars.⁴⁸ Thus the bloodbath of history, for Hegel, becomes the invigorating spa that quickens the pulse of spirit.

Thus also can a republican understanding of property come to *contain well* the diverging forces of self-interest and public interest.⁴⁹ And thus can a regard for the necessity of political agitation become integral to a proper understanding of the law without seriously threatening the institutional coherence of law.⁵⁰

What remains of plurality in the legal thinking of Frank Michelman? Perhaps, as is the case also for the most vigorous pursuits of plurality, only ‘traces of its absence’.⁵¹ Can Lèvinas claim to have presented us with the exteriority (the difference not held in common, the difference of difference) that would constitute plurality? He postulates the non-violent encounter with the face of the other as a condition in this regard.⁵² Derrida has his doubts whether this is possible.⁵³ Will Derrida ever claim to have presented us with difference and thus with plurality? He will at most claim to have traced relentlessly its constant disappearance. He will at most claim to have traced the promise of otherness and plurality postponed and promised by this disappearance. Let us therefore trace further the absence of plurality in the work of Michelman. Towards the end of his essay ‘Traces of self-government’, Michelman points out what he believes to be lacking in Ronald Dworkin’s theory of law:

This brings us, finally to what is lacking in Ronald Dworkin’s conception of law as (judicial) integrity, even in my most optimistic reconstruction. What is lacking is dialogue. Hercules, Dworkin’s mythic judge, is a loner. He is much too heroic. His narrative constructions are monologues. He converses with no one, except through books. He has no encounters. He meets no otherness. Nothing shakes him up. No interlocutor violates the inevitable insularity of his experience and outlook. Hercules is just a man after all. He is not the whole community. No one could be that. Dworkin has produced an apotheosis of appellate judging without attention to what seems the most universal and striking institutional characteristic of the appellate bench, its plurality. We ought to consider what that plurality is ‘for’. My suggestion is that it is for dialogue, in support of judicial practical reason, as an aspect of judicial self-government, in the interest of our freedom. There is a message there for the politics of judicial appointments, not to mention for the politics of law.⁵⁴

This passage does not resolve the question of Michelman’s stance on plurality. It poses it again starkly in full view of its seemingly insurmountable irresolution. On the one hand, Michelman seems to give us what could be interpreted (moving all too hastily, we shall see below) as

47 GWF Hegel *Phänomenologie des Geistes* in *Werke in 20 Bänden* (1970) III 36: ‘Aber nicht das Leben, das sich vor dem Tode scheut und von der Verwüstung rein bewahrt, sondern das ihn erträgt und in ihm sich erhält, ist das Leben des Geistes.’

48 Hegel *Phänomenologie des Geistes* 492: ‘Die Wunden des Geistes heilen, ohne daß Narben bleiben.’

49 Cf FI Michelman ‘Possession vs. Distribution in the Constitutional Idea of Property’ (1987) 72 *Iowa LR* 1319.

50 FI Michelman *Brennan and Democracy* (2000) 78–83.

51 Michelman ‘Traces of Self-Government’ (n 39) 65.

52 Cf Lèvinas *Totalité et Infini* (n 36) 215: L’idée de l’infini se produit dans l’*opposition* du discours, dans la socialité. Le rapport avec le visage avec l’autre absolument autre que je saurais contenir, avec l’autre, dans ce sens, infini, est cependant mon Idée, un commerce. Mais la relation se maintient sans violence – dans la paix avec cette altérité absolue. Lèvinas refers to this relation (without relation – cf 78–79) between the self and the other as one of true plurality, one that exceeds the dialectic appropriation of the other. Cf 70, 124–126, 222.

53 J Derrida ‘Violence and Metaphysics’ in *Writing and Difference* (1978) 148: ‘The very elocution of nonviolent metaphysics is its first disavowal. ... One never escapes the economy of war.’

54 Michelman ‘Traces of Self-Government’ (n 39) 76–77.

vintage L  vinas: Dworkin's judge 'has no encounters'. 'He meets no otherness.' But how, on the other hand, can one still, having invoked a serious concern with encounters and otherness, refer to 'our freedom'? Does the reference to encounters with otherness not require us to refer to 'our freedoms', 'our irreconcilable freedoms'? Is Michelman, perhaps less frankly (or less candidly) this time, not again befriending the fundamental contradiction in this passage?

Moreover, how can the factual plurality of the judges of an appellate division warrant an encounter with otherness when that appellate division has a tangibly homogenous institutional constitution? Are these appellate judges not all exquisitely trained lawyers? Are they not thus all steeped in a very specific manner of 'judicial practical reason'? For a considerable time legal theory has endeavoured to curtail the epistemological havoc wreaked by the legal realists by invoking the institutional training of judges as a source of consistent judicial reasoning.⁵⁵ Would the critical legal question, one that takes the problem of plurality really seriously, not be how legal reasoning could break out of the mould of a disciplining legal training, a disciplining training that largely destroys the plurality of the bench to which Michelman refers? How could 'a policy of judicial appointments' address this problem?

What kind of judge would Michelman have appointed to address this problem? Certainly not one that represents a constituency. A representative judiciary, he argues convincingly, will not solve the problem of plurality because such a judiciary will more than ever be prohibited from discerning otherness. They will be obliged or at least pressurised to serve the pre-existing and therefore exclusionary politics of a constituency.⁵⁶ What kind of judge would Michelman then have appointed? He would want someone like Justice Brennan on the bench. Of course, he would want a number of judges like Brennan appointed and the critical legal theorist concerned with plurality would most likely agree that one cannot conceivably do better than having a couple of Brennans on the bench when the question of otherness and plurality is at issue. But there is more to *Brennan and [plurality]* than a mere plurality of judges like Brennan. What makes Brennan different from Hercules? What distinguishes Brennan from Hercules is his 'associati[on of] litigation with political contention and dissent', a regard that informed his expansive understanding of locus standi considerations displayed in the case of *NAACP v Button*.⁵⁷ In other words, Michelman sees in Brennan's judicial record an understanding of court procedures as a forum for fundamental political debate that calls for a 'reconsidering[and revising of the rules of justice themselves]'.⁵⁸ He also sees in Brennan's record a '[t]olerance for disorder ([e]ven vis-  -vis [c]ourts)'.⁵⁹ He sees in this record a 'solicitude for [a]gitators and [d]isrupters'.⁶⁰ This sensibility clearly reflects a recognition that the law is never settled. The law must inevitably have the last say as far as a particular dispute is concerned, but there is no last say as far as the law is concerned. There is no last say as regards the last say. Hence the inevitability of judicial dissent. Michelman's contention regarding the plurality of the bench comes into its own when he argues (quoting from Brennan's *In Defence of Dissents*):

55 Cf E Mensch 'The History of Mainstream Legal Thinking' in D Kairys (ed) *The Politics of Law* (1990) 27.

56 FI Michelman 'Dilemmas of Belonging: Moral Truth, Human Rights and why we might not want a Representative Judiciary' 2000 *UCLA LR* 1221, 1225; Michelman ''Protecting the People from Themselves' (n 31).

57 Michelman *Brennan and Democracy* (n 50) 72-73.

58 Michelman *Brennan and Democracy* (n 50) 74.

59 Michelman *Brennan and Democracy* (n 50) 76.

60 Michelman *Brennan and Democracy* (n 50) 78.

In other words, American[s] are able to sustain a sense of themselves as politically self-governing precisely because and insofar as official lawmakers, judges included, do not 'shut down communication as soon as a decision is reached' but encourage infinite debate.⁶¹

Note well, Michelman does not argue that Americans can be deemed to be self-governing. He argues only that they 'are able to sustain *a sense* of themselves as politically self-governing.' The ambivalence of this sentence is most remarkable. At issue is clearly an acknowledgement, not of the presence of self-government, but of its infinite postponement, that is, its absence. Simultaneously at issue, however, is not a concern with this acknowledgement, not a concern with a sense of the absence of self-government, but a concern with the sustenance or resuscitation of a sense of its presence despite its absence. 'Americans are able to sustain a sense of themselves as politically self-governing.' In 'The limits of constitutionalism' Michelman contends that self-government is impossible, yet remains something to strive for. Hence the invocation of self-government as a regulative idea. And one would think that the invocation of self-government as a regulative idea would have as its cutting and critical edge the inculcation of a sense of the interminable absence of self-government. How is this to be reconciled with 'Americans are able to sustain a sense of themselves as politically self-governing'?

And what is it that would rid us of the sense of self-government as self-government understood as a regulative idea would seem to require? What would instil a sense of the crisis of the absence of self-government? I made mention above of the facelessness of the regulative idea. I then cited L  vinas reprimanding philosophy for substituting ideas for persons. The suggestion was that self-government as a regulative idea somehow again silences the persons affected by the absence of self-government, silences those ending up being governed by others. The very idea of the regulative idea evinces a synthesising, finishing or 'totalising' force that somehow seems to get us through the crisis of the absence of self-government. The synthesising force of the idea would allow for a befriending of the fundamental contradiction as something that is not quite as critical as Kennedy contends it to be. In the final analysis we (or at least the Americans) find ourselves (themselves) quite capable of sustaining a sense of self-government. The facelessness of the regulative idea quite clearly effects an effacement of the idea itself.

Ultimately, the question at issue here concerns the status of the trace. What is a trace? Absence or presence? Absence of presence or presence of absence? Indeed. The trace 'is' absence and presence, absence of presence and presence of absence. From a certain perspective, the trace can be invoked to sustain a sense of presence, presence of self-government, for instance. But this is clearly a reduction of the trace. Can one invoke the trace more consistently as that which also indicates absence, indeed, absence of self-government? Can one invoke the trace in a way that respects its ghostly existence between presence and absence, between life and death? Can the trace come to haunt us rather than just sustain us?

The regulative idea will not haunt us without a face, without the face of the coerced, the face of the sacrificed. We must pursue the traces of self-government through the appearance or the apparition of a face. Apparition rather than appearance, for some of the faces are locked up. Some, in fact, are dead.

61 Michelman *Brennan and Democracy* (n 50) 75.

IV THE FACELESS OFFERING, UNACKNOWLEDGED SACRIFICE

Perhaps, then, it is the facelessness of the idea that needs to be addressed, the substitution for persons that the philosophical idea effects. L  vinas argues that it is the face of the other that shatters the totalising and synthesising force of philosophy. The face of the other always remains irreducibly other to the self. The face of the other remains infinite otherness. At issue for L  vinas is a separation between the self and the other that no relationship can surmount or overcome. According to him, language plays a crucial role in the infinite separation that reveals the other's otherness. At least a certain kind of language. Not the language intent on merely transmitting a coherence of concepts.⁶² Such language, says L  vinas, consists in suppressing the otherness of the other.⁶³ This would explain why Michelman's assertion that there is nothing *illogical* about the regulative idea does not yet offer us any encounter with otherness. The concern with logic or the mere avoidance of the illogical is bound to suppress otherness. The logical or the absence of the illogical always claims to unite us. The revelatory potential of language pertains to language that seeks to address the otherness of the other. Such language would reveal the infinite separation between self and other. Such language, I wish to contend, would be a precondition for plurality. As L  vinas avers, the registration of separation is the condition for a plurality of interlocutors.⁶⁴ But is such a language possible?

To what extent can legal language register the infinite separation between self and other? The problem we have been addressing above concerns the inevitable coerciveness of all legal regimes, human rights regimes included. The coercion at issue here concerns the inevitability of interpreting and deciding the law in a way that discards the claim of a party to a dispute without being able to convince that person that the claim is illegitimate. In other words, coercion concerns the *sacrificial* dismissal of a claim that may well be legitimate in favour of a social goal that may be said to enjoy greater momentary support but not necessarily greater legitimisation within the relevant political legal dispensation. Sacrifice, to oversimplify for a moment, concerns the utilitarian denial of otherness.⁶⁵ Legal language that does not acknowledge the sacrificial logic on which it turns, becomes a matter of utilitarian expedience that completely eclipses the otherness that it encounters, deals with and dismisses in the final analysis. Recognition and acknowledgement of sacrifice, on the other hand, would at least entail a regard for the gravity of the procedure that encounters, deals with and ultimately dismisses otherness. Otherness would come to weigh heavily upon legal procedures if these procedures were to begin to acknowledge the dynamics of sacrifice in which they partake.

The elements of sacrifice, its violence, the killing or destruction of the offering, the perpetration of that which is generally prohibited, certainly concern an economic evasion of the claims of the sacred on the self. Something is offered for destruction instead of the self. But contrary to the oversimplification indulged in the previous paragraph, sacrifice also involves a *trans-gression* which at least momentarily exceeds the economic destruction of otherness, a transgression of which the crucial moment cannot but register the otherness of the other before this otherness gets destroyed economically. The encounter with the other and the sacred or the other as sacred consists in transgression. How and to what effect can law register its moment of transgression? It can do so, I would suggest, by recognising the sacrificial practice through

62 Cf L  vinas *Totalit   et Infini* (n 36) 70. Cf also 173.

63 Ibid.

64 Ibid.

65 The dynamic of sacrifice is more complicated. As I have shown elsewhere, sacrifice is both the condition for and the destruction of otherness. Cf JWG van der Walt 'Law as Sacrifice' 2001 *TSAR* 710, 721–722.

which law itself comes to do that that it claims may not be done, the sacrificial practice through which the law itself denies someone the self-government, the equality before the law, the equal dignity and equal freedom that it promises to all. Only by recognising the gravity of the inevitable moments of transgression that comes to a head in legal procedures can legal language hope to register the face of the other. The encounter with otherness without which plurality remains nothing but a philosophical idea requires the language of law to register the memory of sacrificial transgression.

V DÉCHÉANCE OR FORFEITURE

The word *déchéance* comes up repeatedly in Georges Bataille's *L'Érotisme*.⁶⁶ A direct translation of the word would be 'forfeiture'. Bataille uses the word to refer to the disappearance of sacrificial transgression in sexual relations. This, he contends, could happen in marriage,⁶⁷ but also in the low life of prostitution and unrestricted permissiveness. In the latter case, forfeiture finds expression in explicit and constant lewdness. In the former, it finds expression in the economic institutionalisation and stabilisation of sexuality. The result of this is that the sexual act (in the case of the former and latter) or any reference to it, however course (in the case of the former), completely loses the quality of the taboo that informs the experience of transgression.⁶⁸

The word *déchéance*, incidentally but significantly for my argument, also has a legal connotation. The word also refers to the deposition of governmental or parental authority or the deprivation of civil rights. Especially the latter meaning has bearing on the point that I wish to make here: Every instance of human interaction concerns the tragic instantiation of disparity or incongruity, namely, the encounter between irreconcilable liberties.⁶⁹ The semantic ordering of this disparity or incongruity by means of moral or legal language that reduces the semantic overload of the disparity or congruity to a common code or concept necessarily violates one if not both the liberties at issue.⁷⁰ In other words, every moral and/or legal concept can be understood to constitute a transgression. Such concepts should, if at all claiming to be concerned with the liberties of those involved in interaction, if at all claiming that those liberties are in principle inviolable, be accompanied by a sense of transgression. At issue would be a sense of violating the inviolable. Thus accompanied by a sense of transgression and of violating the inviolable, moral and legal concepts would regain a relation with the sacred. Only through a sense of violation could the law encounter the inviolable. Only thus, to return to the legal connotation of the word *déchéance*, would the law's inevitable violation of liberty not become a complete deprivation of liberty. Liberty, however violated, would thus still receive legal recognition.

To what extent can legal language come to reflect this sense of transgression and violation? How far does Michelman take us on the way to recognition of legal sacrifice, of the legal violation of the inviolable? He certainly endeavours to take us in this direction. His reference to

66 G Bataille *L'Érotisme* in *Oeuvres Complètes X* (1987) 136, 137

67 Bataille *L'Érotisme* (n 66) 112.

68 Bataille *L'Érotisme* (n 66) 136.

69 Of course, there are exceptions or there at least sometimes appear to be exceptions, but they are not theoretically interesting.

70 Adorno referred to law as the apex of the identification of the non-identical on which all language turns. Cf T Adorno *Negative Dialektik* (1975) 304–306; *Soziologische Schriften I* (1972) 378–379.

the regulative idea towards the end of ‘The limits of constitutional theory’ certainly concedes that the law constantly fails to grant everyone the self-government that constitutional democracy promises. The law never fails to coerce. This is certainly a concession that the law never fails to violate the inviolable. But the notion of the regulative idea, I wish to contend with reference to L  vinas, is such an abstract philosophical way of dealing with this violation that it renders the violated faceless and the violation insignificant or non-serious. Hence perhaps Michelman’s ability to frankly embrace legal violation as something that need not concern us too much. It is something we should learn to like, he suggests with reference to Rosenfeld. It is in fact our friend, he avers with reference to Kennedy. What remains of the sense of violation in the befriending of the fundamental contradiction? It appears to disappear along the way. I am concerned about forfeiture and *d  ch  ance* in this regard, certainly not of the lewd kind, but something similar to the decent marital kind. Quarrel is the spice of life, the happily married say knowingly and frankly. Again, vintage Hegel. But Hegel, as Bataille realised well, was never quite in step with himself. And Michelman’s frankness may well point to something apparently related but fundamentally and vastly different from forfeiture and *d  ch  ance*.

I quoted Michelman above saying Hercules has no encounters. ‘He meets no otherness.’ ‘Nothing shakes him up’. Would this point to a different moment in Michelman’s legal thought? Let us not move too fast. The passage from which these statements come, we saw, makes clear that Michelman locates the potential for this otherness in the plurality of judges constituting the appellate division. At issue is the conversation of high priests around the altar, but where features the sacrificial offering that, whenever law is at stake, is always human?

Roberto Mangabeira Unger writes about the Critical Legal Studies movement:

When we came, they were like a priesthood that had lost their faith and kept their jobs. They stood in tedious embarrassment before cold altars. But we turned away from those altars and found the mind’s opportunity in the heart’s revenge.⁷¹

This remarkable passage reflects the fundamental ambivalence of the Critical Legal Studies movement. On the one hand it would seem to respond to the law’s pretension that the age of legal sacrifice is long past. The altars have become cold. On the other hand, the intellectual revolt⁷² of the heart that the movement claims to pursue (a claim that will always draw me to them) suggests also that we can turn away from those altars (a suggestion that will always remind me to also keep my distance), as if this would not leave them cold.⁷³

The intellectual revolt of the heart, would it not call for a return to the altars of sacrifice, with gravity (but also with the lightest touch⁷⁴) and the deeper religiousness that Derrida

71 RM Unger *The Critical Legal Studies Movement* (1986) 119.

72 I substitute ‘revolt’ for ‘revenge’. The word ‘revenge’ signifies a heartlessness that cannot be associated with the heart.

73 As regards the real regard for but eventual turning away from sacrifice in Kennedy’s writings, cf Van der Walt *Law as Sacrifice* (n 65) 719. It should be noted that L  vinas too suggests that we can turn away from the sacrificial. The nonviolent language, discourse or *parole d’honneur* signified by the face of the other, a language to which he refers as prose, would deliver us from the rituals of poetry. Cf L  vinas *Totalit   et Infini* (n 36) 221–222.

74 Cf JWG van der Walt ‘Psyche and sacrifice: an essay on the time and timing of reconciliation’ (forthcoming). In this essay I suggest that the failure to come to terms with sacrifice relates directly to a failure to come to terms with reconciliation as a non-presence, a non-presence, however, that must not be confused with absence.

associates with the tragic notion of an impossible hospitality? Is this not what is required when we approach the violation of the inviolable and the inner circles of sacrifice?⁷⁵

Yes and no. We need to be critically concerned with the undeniable fact of sacrifice in social life, but only in order to take a first step towards the seemingly impossible possibility of a non-sacrificial existence. Sacrifice is not to be celebrated. If anything, it is to be mourned deeply.

VI FRANK'S WAY

Would this call for tears? Not necessarily so. This is perhaps where a Nietzschean smile (not quite laughter), a grave light-heartedness could be taking a seemingly small but unfathomable step away from forfeiture to join Wordsworth:⁷⁶ 'Thanks to the human heart by which we live, thanks to its tenderness, its joys, and fears' we receive '[t]houghts that do often lie too deep for tears.'⁷⁷

Indeed, a certain frankness may well bear more honest witness to the tragic than the all too facile rhetoric of tears. To be sure, the all too optimistic conceptual liberalism that Michelman (sometimes) senses in Habermas and Rawls rests blissfully oblivious to the tragic conflicts in real political time. But an all too pessimistic liberalism would also suggest that political time should transcend destructive conflict. It would also suggest a failure to come to terms with real politics. And if one is neither an outright optimist nor an outright pessimist, one is bound to evacuate the scene of simple stances and relocate to the ambiguous space of an honesty and frankness that wavers, for instance, between a concern with a sustained sense of the presence of self-government and an acute regard for its absence. This is, I believe, where Frank Michelman's frank and honest liberalism could be taking us. And this inevitably also leads one to an interminable ambiguity between forfeiture or *déchéance* and a light-hearted if not playful acceptance of tragedy (*Trauerspiel*).⁷⁸ This frank and honest liberalism may well constitute the limits of critical legal thought.

'Got mice?'

75 Cf H Hubert and M Mauss *Essai sur la nature et la fonction du sacrifice* in Mauss *Oeuvres 1. Les fonctions sociales du sacré* (1986) 227; H Hubert and M Mauss *Sacrifice its Nature and Function* (1964) 28–29.

76 Bataille contends that Friedrich Nietzsche never discerned that a certain frank and perhaps not so irene Friedrich Hegel was ever so close to taking this step.

77 From *Ode: Intimations of Immortality from Recollections of Early Childhood* in Harold Bloom & Lionel Trilling (eds) *The Oxford Anthology of English Literature: Romantic Poetry and Prose* (1973) 181. So again the word 'heart' beckons repeatedly (here from Unger to Wordsworth) to be pondered. But how to do so? For previous attempts, cf JWG van der Walt 'The Quest for the Impossible and the Beginning of Politics: A Reply to Dennis Davis' (2001) 118 *SALJ* 463 at 472; 'Law as Sacrifice' (n 65) 727; 'Hospitality and the Ghost: A Reply to Emiliós Christodoulidis' 2002 *TSAR* 362 at 369.

78 Cf P Lacoue-Labarthe 'Debate' in JL Nancy & P Lacoue-Labarthe *Retreating the Political* (1997) 86.

KARIN VAN MARLE

LOVE, LAW AND SOUTH AFRICAN COMMUNITY: CRITICAL REFLECTIONS ON 'SUSPECT INTIMACIES' AND 'IMMANENT SUBJECTIVITY'

You cannot quit me so quickly
There's no hope in you for me
No corner you could squeeze me
But I got all the time for you, love
The space between, the tears we cry,
Is the laughter that keeps us coming back for more
The space between the wicked lies we tell, and hope to keep safe from the pain

– 'The Space Between', *Everyday*
Dave Matthews Band

I INTRODUCTORY REMARKS

The thought-provoking work of Frank Michelman has provided South African scholars with means to conceive of the law in ways different from our education, which is rooted mainly in formalism and positivism. His understanding of constitutional law that engages with politics and community has challenged the traditional separation between law and politics and undertheorised conceptions of community due to the overemphasis placed on individual rights and freedoms. Michelman's description of what he calls 'pluralist' politics and his own support for 'jurisgenerative' politics provides a good starting point for an assessment of South African approaches to law, politics and community. In this essay, I shall support an argument for yet another approach to politics, namely 'reflexive' politics.

I shall tentatively dwell on the (re)construction of a South African community and the role that law, and in particular constitutional (or legal) politics, can (not?) and should (not?) play in this process. I should make my scepticism about reconstructive attempts explicit from the outset. My vision of a community is in support of for example Iris Marion Young's¹ notion of

1 See M Young 'City Life and Difference' in P Kasinitz (1995) *Metropolis. Centre and Symbol of our Times* 250–270; 'Asymmetrical Reciprocity: On Moral Respect, Wonder and Enlarged Thought' (1997) 3 *Constellations* 346–350; 'City Life and Difference' in S Benhabib & D Cornell (eds) (1987) *Feminism as Critique* 57; 'Communication and the Other: Beyond Deliberative Democracy' in S Benhabib (ed) (1996) *Democracy and Difference* 120. See in general (1990) *Justice and the Politics of Difference*. See also WB le Roux 'From Acropolis to Metropolis: The New Constitutional Court Building and South African Street Democracy' (2001) 16 *SA Public Law* 139–168 and G Frug 'The Geography of Community' (1986) 38 *Stanford LR* 1047.

‘city life’ or ‘street life’ and a ‘heterogeneous public,’ or Drucilla Cornell’s² imagined ‘community of the ought to be’. These communities are not bound by the limits of the law or constitutional politics, but seek continuous construction, reconstruction and deconstruction. The politics at play here is not stilled from ‘contestation’ and confrontation, but is open to ‘risk’, ‘reflexivity’ and ‘self-reference’.³

In what follows we shall briefly return to the construction of what Michelman calls ‘law’s republic’. We shall consider the critique on civic republicanism levelled by Emiliios Christodoulidis and his support of reflexive politics in contrast to legal (jurisgenerative) politics and the implications for community. Central to this critique is the distinction between love and law; the nature of love being reflexive and that of law being reductive. Before we eventually return to Michelman, we shall briefly look at Jean-Luc Nancy’s notions of the ‘empty community’ and the ‘myth of the common’ and how they can assist us in our reflections on politics and community.

Michelman himself has problematised an understanding of his position as supporting a rigid form of communitarianism or even civic republicanism. My interpretation of Michelman shall be to read him as a hybrid thinker who occupies a space between the simple classifications of liberalism and civic republicanism. I shall evaluate his contribution to South African legal and constitutional theory accordingly. Because the difficult issue of a South African community is at stake in this article, my main concern shall be whether Michelman’s ‘republic’ allows for a community that is eternally contested and self-reflective.

II CONSTRUCTING LAW’S REPUBLIC

In certainly one of his most famous articles, ‘Law’s republic,’ Michelman⁴ considers how the decision in *Bowers v Hardwick*⁵ could have been different if the court took notice of a ‘republican-inspired’ standpoint. He makes three claims: that the Supreme Court’s analysis of and decision in *Bowers v Hardwick* are strikingly resistant to obvious claims of political freedom; that judicial constitutional analysis ought to be receptive to such claims; and that constitutional analysis is rooted in underlying sensibilities and understandings regarding the larger aims and methods of constitutionalism. He argues that American constitutional understanding and analysis might benefit from reflection upon civic republicanism and that it might

2 ‘The Art of Witnessing and the Community of the Ought to Be’ in (2002) *Between Women and Generations. Legacies of Dignity* 71–94.

3 These terms are used by EA Christodoulidis in his multiple works on the theme of law, politics and community. I shall elaborate on all of them below. See amongst others (1996) *Law and Reflexive Politics*; ‘“A New Constitutional Reality for Civil Society?” Some Cautionary Remarks on Republican Citizenship’ in R Bellamy et al (1995) *Democracy and Constitutional Culture in the Union of Europe* 177–196; ‘What Re-discovery of the “Polis”?’ Some Thoughts on Rights, Conflict and the Politics of Identity’ (1997) 83 *Archiv für Rechts- und Sozialphilosophie* 184–191.

4 F Michelman ‘Law’s Republic’ (1988) 97 *Yale LJ* 1493–1537. See also among many others ‘Human Rights and the Limits of Constitutional Theory’ (2000) 13 *Ratio Juris* 63–76; ‘Justification (and Justifiability) of Law in a Contradictory World’ (1986) *Nomos* xxviii 71–99; ‘Formal and Associational Aims in Procedural Due Process’ in J Pennock (ed) *Due Process (Nomos XVIII)* (1977); ‘Populist Natural Law (Reflections on Tushnet’s “Thin Constitution”’ (2000) 34 *Univ Richmond LR* 461–487; ‘The Subject of Liberalism’ (1994) 46 *Stanford LR* 1807–1833; ‘Constitutional Authorship by the People’ (1999) 74 *Notre Dame LR* 1605–1629; ‘The Supreme Court 1985 Term Foreword: Traces of Self-Government’ (1986) 100 *Harvard LR* 4–77; ‘Postmodernism, Proceduralism, and Constitutional Justice: A Comment on Van der Walt and Botha’ (2002) 9 *Constellations* 246.

5 478 US 186 (1986).

invigorate a constitutional discourse that would prevent decisions like the one in *Bowers v Hardwick*.

Michelman is well aware of the claims of critics that communitarianism and republicanism are 'solidaristic doctrines' presupposing a degree of moral consensus that is nonexistent in modern society. These critics argue that communitarianism and republicanism support a majoritarian doctrine of popular legislative supremacy that is fundamentally incompatible with modern constitutionalism. He argues, however, that republican constitutional thought does not necessarily reflect any such static communitarianism. He contends that a reconsideration of republicanism's deeper constitutional implications can remind us of how the renovation of political communities can enhance everyone's freedom by including those who have been excluded. To him, republican constitutionalism involves 'a kind of normative tinkering' that entails the 'ongoing revision of the normative histories that make political communities sources of contestable value and self-direction for their members'. A reconception of these histories will also be needed to extend political community to persons who have been excluded. He says that contemporary liberals have less to fear from 'lurking social solidarism' than from a constitutional jurisprudence that prevents the community from engaging in self-transformation.

What ought to alarm liberals about the *Bowers* decision, according to Michelman, is not a judicial affection for moral majoritarianism, but the decision's embodiment of an 'excessively detached' and 'passive' position towards constitutional law. He calls the jurisprudence of the decision in *Bowers* 'backward looking' and 'authoritarian' because it equates public values with the formally enacted preferences of a recent legislative, or past constitutional majority, or with the teachings of a historically dominant orthodoxy. Justice White's decision in *Bowers* reflects a positivistic constitutional theory by stating that it is not for the court to 'impose' its 'own choice of values' on the people. The judge believes that the court is the 'servant', not the 'author' of a prescriptive text and accordingly cannot inquire into meaning, reason or value. Michelman asks why the Supreme Court should not be an organ of politics if that is what it would have taken to secure liberty and justice for Hardwick. The court's reason is that for the court to act politically would amount to a judicial usurpation of power that belongs to 'the people', acting through their elected representatives. Michelman responds:

But again, why? Why by right to others? Why ought popular-majoritarian preference rather than judicial argument ultimately determine the question of law controlling Hardwick's liberty?⁶

He replies that the answer is of course democracy, but argues that the answer entails more, e.g. deliberation on *what* democracy is. If such a deliberation does not happen, democracy conveniently answers to the need for authority.

When the social determination of disputed questions of value is imaginable only as a battle of preferences or as the exertion of an arbitrary, dominant will, then law – the adjudicative act – tends to be understandable only as the unquestioning and uncreative (which is to say necessarily wooden or unintelligent) application of the prior word of some socially recognized, extra-judicial authority.⁷

Michelman advocates a republicanism that entails a close consideration of certain implications of historical republican constitutional thought that can point us towards an account of the relations among law, politics, and democracy. He argues that American constitutionalism rests

6 Michelman 'Law's Republic' (note 5 above) 1498.

7 Michelman 'Law's Republic' (note 5 above) 1499.

on two premises regarding political freedom: 'first, the American people are politically free inasmuch as they are governed by themselves collectively, and, second, that the American people are politically free inasmuch as they are governed by laws and not men'.⁸ The problematic relationship between the 'government of the people by the people' and the 'government of the people by laws' is evident. Both the formulas of 'self-rule' and 'law-rule' express a demand that the American people are bound to respect as a primal requirement of political freedom. 'Self-rule' demands the people's determination for themselves of the norms that are to govern their social life, while 'law-rule' demands the people's protection against abuse by arbitrary power.

He considers a possible way of thinking through this tension by conceiving of politics as a process in which 'private regarding men' become 'public regarding citizens' and thus members of a people. Michelman refers to this political process as 'jurisgenerative'. Jurisgenerative politics is historically recognisable as an idea of 'republican lineage.' He believes that republicanism signifies the sort of belief in 'jurisgenerative politics' that must play a role in any explanation of how the constitutional principles of self-rule and law-rule might coincide.

Pluralist politics for him seems the 'negation of jurisgenerative politics'. With pluralism he does not mean the acceptance and celebration of diversity within a society. He means

the deep mistrust of people's capacities to communicate persuasively to one another their diverse normative experiences: of needs and rights, values and interests, and, more broadly interpretations of the world. For true pluralists, good politics can only be a market-like medium through which variously interested and motivated individuals and groups seek to maximize their own particular preferences.⁹

He continues to explain that from the pluralist standpoint, constitutional law is to politics what private law is to free-market activity – nothing but a body of governing rules that stands outside the process. For pluralists the law must be radically separated from politics – 'it must become an autonomous force against politics, a force elaborated through its own non-political modes of reason by its own non-political, judicial organ.'¹⁰

Michelman¹¹ explains that in republican thought the 'normative' character of politics depends on the independence of mind and judgment, the authenticity of voice, and in some versions of republicanism, the diversity of a plurality of views that citizens bring to 'the debate of the commonwealth'. He argues that republicanism has always realised the importance of both good politics and a strong legal order. He observes a 'republican attachment' to rights.

Yet republican thought is no less committed to the idea of the people acting politically as the sole source of law and guarantor of rights, than it is to the idea of law, including rights, as the precondition of good politics.¹²

Michelman sees plurality as the social condition that defines modern American politics. Modern (American) politics cannot be made jurisgenerative without plurality as a virtue. He develops a 'dialogic constitutionalism' that responds affirmatively to social plurality where courts can play an active and generative role.¹³ We must reclaim the idea of 'jurisgenerative

8 Michelman 'Law's Republic' (note 5 above) 1509.

9 Michelman 'Law's Republic' (note 5 above) 1507–1508.

10 Michelman 'Law's Republic' (note 5 above) 1509.

11 Michelman 'Law's Republic' (note 5 above) 1504.

12 Michelman 'Law's Republic' (note 5 above) 1505.

13 Michelman 'Law's Republic' (note 5 above) 1505.

politics' from its ancient context of hierarchical, organicist and solidaristic communities, for the modern context of equality, liberty and plurality.

Michelman seeks to clarify certain conditions of republican constitutionalism's possibility in a modern, liberal society. He wants to uncover beliefs we must hold regarding ourselves, our social relations, and specifically our capacities for 'dialogic self-modulation'. He states the problematic experience of the tension between popular self-government and a government of laws, and derives from it a normative idea of 'dialogic constitutionalism' as consistent with this problematic experience. A political process can validate a societal norm, like plurality, as self-given law only if participation in the process results in some shifts or adjustments in relevant understandings on the part of participants. It can further do so only if there is a set of pre-scriptive social and procedural conditions under which one's understanding is not considered or experienced as coercive, invasive, or as a violation of one's identity or freedom, and if those conditions actually prevailed in the process that is supposed to be jurisgenerative.¹⁴ Michelman supports a certain view of the self:

Such a self necessarily obtains its self-critical resources from, and tests its current understandings against, understandings from beyond its own pre-critical life and experience, which is to say communicatively, by reaching for the perspectives of other and different persons.¹⁵

He argues that such a conception of political freedom might make plurality a virtue. The legal form of plurality is indeterminacy. Legal indeterminacy in this sense is the precondition of the dialogic, critical, transformative dimension of legal practice. But the generative indeterminacies are products of action by those who enter the dialogue and seek to disrupt it from the sidelines.

So the suggestion is that the pursuit of political freedom through law depends on 'our' constant reach for inclusion of the other, of the hitherto excluded – which in practice means bringing to legal-doctrinal presence the hitherto absent voices of emergently self-conscious social groups.¹⁶

Michelman then makes the crucial observation that much of the normatively significant dialogue in the United States occurs *outside* the major, formal channels of electoral and legislative politics. In fact, for most citizens in modern society these channels cannot possibly provide much direct experience of 'dialogic engagement'. Most dialogic engagement occurs in various other political and other arenas of broad public life. He argues that encounters, conflicts, interactions and debates that arise in town meetings, civic and voluntary organisations, social and recreational clubs, schools, public events, street life and so on are all arenas of potentially transformative dialogue.¹⁷ He notes that the daily experience of social life and policy that takes place in 'private' can affect people's lives more profoundly than government action. These experiences must be seen as sources and channels of republican self-government and jurisgenerative politics. These arenas of citizenship encompass not only *formal participation* in public affairs but *real presence* in public and social life in general. Michelman argues that such a non-state centred notion of republican citizenship is historically American

14 Michelman 'Law's Republic' (note 5 above) 1526–1527.

15 Michelman 'Law's Republic' (note 5 above) 1528.

16 Michelman 'Law's Republic' (note 5 above) 1529.

17 See in this regard J Nedelsky 'Dilemmas of Passion, Privilege and Isolation: Reflections on Mothering in a White, Middle-class Nuclear Family' in J Hanigberg & S Ruddick (1999) *Mother Troubles: Rethinking Contemporary Maternal Dilemmas* 304–334.

and characteristic of the contemporary civic revivalism of the time. He argues accordingly that a notion of republican dialogue that is not exclusively and immediately tied to the coercive exercise of centralised majoritarian power, can contribute to active citizenship.

For Michelman the decision in *Bowers v Hardwick* is an 'unjustified denial of due citizenship', by the denial of *liberty*, and specifically the aspect of liberty known as *privacy*. The US Supreme Court accepted the explanation of the *meaning* and *purpose* of the challenged law. The meaning of the law is to *punish* the engagement by homosexual partners in certain forms of sexual intimacy. The purpose of the law is to give *expression* and effect to a legislative majority's *moral rejection* of homosexual life. Michelman states that such a purpose is deeply suspect under the modern republican commitment to social *plurality*. Homosexuality has not only come to be experienced, claimed and socially reflected and confirmed as an aspect of identity demanding respect, but is also challenging established orders. The effect of a law like the one in Georgia on homosexuals is denial or impairment of their citizenship. He argues that participation in the various arenas of social life is central to modern republican constitutionalism. The sodomy law is a public expression that endorses and reinforces majoritarian denigration and suppression of homosexual identity, but it also denies citizenship by violating *privacy*.

Michelman refers in this regard to the critique of pro-abortion supporters of the US Supreme Court for affirming women's rights of choice on a constitutional principle of privacy. The same argument was used to say that a constitutional principle of privacy would be a poor basis on which to ground judicial invalidation of laws, such as Georgia's penalising of homosexual acts. It is said that to base such a decision on privacy would reinforce the idea that homosexuality is merely a form of conduct and would fail to recognise it as a continuous aspect of identity that demands public expression.

Michelman, however, argues that these critiques of the constitutional privacy doctrine are relevant as long as *privacy stands for an attitude of hostility towards public life and a need for refuge from and protection against public power*. He notes that an approach that differs from this strategy of carving a private space to defend against the public can produce a reoriented understanding. A republican slant can lead to an appreciation of privacy¹⁸ as a political right. He explains that just as property rights become, in a republican perspective, a matter of constitutive political concern (as underpinning the independence and authenticity of the citizen's contribution to the collective determinations of public life), the privacies of personal refuge and intimacy become a matter of constitutive political concern. He argues that Justice Blackmun's dissenting opinion in *Bowers* begins to articulate the republican appreciation of the *political significance of privacy* by explaining the value of intimate association as formative and supportive of personal identity, of self-understanding, and thus of diverse ways of life.

Michelman argues that Cornell's idea of 'recollective imagination' can be applied to republican constitutional theory. He argues for constitutional interpretation as a 'Machiavellian practice of return-to-the-founding-principles' in which the first principle of the founding is the constant value of (re)foundation (renewal, renovation) itself. The problematic character of the constitutional construct (the dichotomy of self-rule and law-rule) allows the constitution to ground our identity as a political community by also inviting us to self-revision through debate

18 See S Benhabib (1996) *The Reluctant Modernism of Hannah Arendt* 212 where she puts forward Hannah Arendt's concept of privacy. Benhabib argues that the reconstruction of the public world can only take place with a parallel reconstruction of the private world.

over its meaning. Although a judicial constitutional intervention 'is not equivalent and rather contrary to actual democracy, actual democracy is not all there is to political freedom.'¹⁹

III A CRITIQUE ON CIVIC REPUBLICANISM

Christodoulidis²⁰ stands critical towards the civic republican claim that the constitution underpins the community's politics by containing the deliberative practice of a community. He highlights the double articulation of law and politics and of law and identity. The connection between law and politics rests on the participation in the dialogic-deliberative practice by which citizens engage in politics. The law and identity bind is explained by the participation in the public realm by the individual as a political actor. Political identity is mediated by citizenship. Republicans establish a connection between the embedded self (an embeddedness that is substantiated through participation in political dialogue that constitutes politics and community) and the law.

According to Christodoulidis, Michelman evades the question of institutionality by either relying on a Dworkinian appeal for virtual participation in judicial argument or on a collapse of the institutional nature of law into public discourse in general.²¹ Referring to Michelman's claim in 'Law's Republic' that 'understandings that are contested and shaped in the daily transactions of civil society at large are of course conveyed to our representative arenas', he argues that Michelman evades the institutional question and the specific (limited) nature of the institutional form.²² Christodoulidis regards this as 'a flight from the logic of institutions and the violence that its logic brings to precisely those "voices" that the republicans are adamant it would have realised.'²³

Turning to aspects of the general critique that Christodoulidis levels against civic republicanism, I shall consider the following: the containment thesis as central to civic republicanism; the explanation of law's tendency to normalise and restore order and finally his support for reflexive politics.

(a) The containment thesis

Civic republicanism holds that the law and in particular a constitution contain politics and substantiate community. A constitution proves a 'home' for deliberative practice that includes two aspects: law and politics, and law and community. Through the practice of deliberation citizens partake in politics, and individuals become part of a community by participating as political actors.²⁴

Christodoulidis highlights two essential requirements for the containment thesis. Firstly, the law must be able to 'pick up' all voices without excluding anyone and secondly, these voices must not be transformed, realigned or distorted. Regarding the first requirement civic

¹⁹ Michelman 'Law's Republic' (note 5 above) 1537.

²⁰ Christodoulidis 'The Aporia of Sovereignty: On the Representation of the People in Constitutional Discourse' (2001) 12 *Kings College Journal* 111–133.

²¹ Christodoulidis 'Aporia of Sovereignty' (note 21 above).

²² Christodoulidis 'Aporia of Sovereignty' (note 21 above) 118. Michelman 'Laws Republic' (note 5 above) 1531.

²³ Christodoulidis 'Aporia of Sovereignty' (note 21 above) 118.

²⁴ Christodoulidis *Law and Reflexive Politics* (note 4 above) 60.

republicans believe that the deliberative process is open and attuned to all voices. Michelman,²⁵ for example, states that it is in particular the ‘marginal’ voices that contribute to political deliberation and that it is crucial that these voices be included in the dialogue.

Regarding the second requirement, Christodoulidis notes that individuals can only claim to be self-determinant insofar as they are able to revise and alter the terms of social life. No external constraints should obstruct their self-revisionary powers and the institutions that provide for their self-determination should not have any such constraints. If law provides for the self-revision of a community, the law itself must not prevent the possibilities for change. Civic republicans must then treat law as ‘malleable, as open to reflexivity, as capable of self-revision’.²⁶

He explains that this is the reason for the references in civic republicanism to the work of the Critical Legal Studies. Their argument requires them to treat the law as self-revisionary, open to meet specific, and even competing, political objectives. For civic republicans legal indeterminacy ensures the space for politics with immanent critique as the mode of political contestation and action. They argue that because law is indeterminate it can accommodate political challenge and thus it contains the potential for the self-revision of the community.²⁷

According to Christodoulidis, these two requirements (that all voices are included and that the voices are not realigned) presuppose a *congruence* between official and unofficial processes, between the formal democratic processes and informal events of public deliberation. According to him, this congruence cannot be guaranteed. Moreover, the possibility of a deep *incongruity* between formal and informal deliberation must be noted. He explains that many groups may not want to be incorporated in the democratic process because they oppose the democratic community, ethos and language. The voices of these groups are meaningful because of their *incongruence*.²⁸

Like Dworkin,²⁹ the republicans set the conditions for a ‘true’ political dialogue that will bring about community but without taking account of the community’s divergent understanding of politics. Christodoulidis uses the following example: What if the community consists of self-interested individuals where the communal deliberation is accordingly truly a bargain of interests? The republicans must then either allow the dialogue that is true to the community and run the risk that it may be self-interested, sexist, racist etc, or they must acknowledge that they cannot account for that community’s dialogue and then prescribe a framework for the dialogue they prefer. As Christodoulidis states, they cannot have it both ways. They must either postulate congruence by undemocratically prescribing the democratic-republican ethic or they will have to concede to the incongruence. He states that the civic republicans are often much too eager to impose certain understandings of community and that they tend to abandon ‘what the law contains as politics’ for ‘what the law constitutes as politics’.³⁰

To summarise the argument so far: the crux of republicanism is the containment thesis. The civic republicans rely on interconnections between politics, community and law, and in

25 Michelman ‘Laws Republic’ (note 5 above) 1493–1573.

26 Christodoulidis *Law and Reflexive Politics* (note 4 above) 63.

27 Christodoulidis *Law and Reflexive Politics* (note 4 above) 64.

28 Christodoulidis *Law and Reflexive Politics* (note 4 above) 64–65.

29 Dworkin *Law’s Empire*. (1986). See also ‘The Suspect Intimacy Between Law and Political Community’ (1994) 80 *Archiv für Rechts- und Sozialphilosophie* 1–18.

30 Christodoulidis *Law and Reflexive Politics* (note 4 above) 68.

Christodoulidis's words, 'republicanism invites us to reconceive all that is political as legal.'³¹ He wants us to resist this legal imperialism and argues for reflexive politics. Reflexive politics is true to the belief that political freedom entails the possibility of contesting everything politically. Civic republicans falsely claim that law can be the vessel for politics and serve as an adequate register of political meaning. They too often conceal political-reflexive questions by replacing them with antipolitical arguments and assume necessity or naturalness where there is contingency.

(b) Law's tendency to normalise conflict

Christodoulidis highlights the debt that republicans have to the Critical Legal Studies for their argument that law can pursue radical politics and need not be confined to rigid institutional assumptions.³² Critical Legal Studies seek to disrupt the legal system's tendency of assimilation and rationalisation and seek deviations and contradictions as intellectual and political opportunities by drawing from the system itself. Civic republicans share these critical aspirations. Christodoulidis argues that although these theorists can say that a system's inertia can be shaken from within, it cannot be carried through to those constitutive assumptions that underlie the institutional identity of the legal system as such. He distinguishes between what he calls simple inertia and structural inertia. While the former can be transformed from within, the latter cannot.³³

He argues that civic republicans and critical legal scholars make the mistake of attributing containment and reflexivity to law. Although simple inertia (one source of normalisation) can be countered, deep-seated structural inertia cannot. Because of structural inertia challenges will always be dealt with as to accord with 'already existing or accepted meaning, always already normalised, kept within the confines of what legal expectations can read as conceivable alternatives, always hedged in, always tamed.'³⁴ Christodoulidis quotes Luhmann stating that in the legal system 'the unknown is assimilated to the known, the new to the old, the surprising to the familiar.'³⁵ Indeterminacy cannot provide for political contestation as such because the indeterminacy itself is fixed and framed by concepts and assumptions. What is contestable, the 'in-roads' of the critique and the slants of the discourse, are already partly given. Although Critical Legal Scholars and republicans can argue that the confines of law can be facilitated and immanent critique can make law more aware of what is latent within it and therefore less confining, the facilitative cannot be identified with the reflexive itself.³⁶

31 Christodoulidis *Law and Reflexive Politics* (note 4 above) 68.

32 See 'The Inertia of Institutional Imagination: A Reply to Roberto Unger' (1996) *The Modern LR* 377–397.

33 Christodoulidis *Law and Reflexive Politics* (note 4 above) 212.

34 Christodoulidis *Law and Reflexive Politics* (note 4 above) 222.

35 Christodoulidis *Law and Reflexive Politics* (note 4 above) 221; N Luhmann 'Meaning as Sociology's Basic Concept' in *Essays on self-reference* (1990) 33.

36 Christodoulidis *Law and Reflexive Politics* (note 4 above) 224.

(c) *Reflexive politics*

In his argument against the containment thesis, Christodoulidis turns to the concept of 'exclusionary reason' as developed by Joseph Raz.³⁷ Raz distinguishes between first-order and second-order reasons – the former referring to reasons to perform an act, the latter to the reasons to act for a reason. Second-order reasons may be positive (a reason to act for a reason) or negative (a reason not to act for a reason). Raz terms the negative second-order reasons as exclusionary. Legal rules and legal systems are typical examples of exclusionary reasons where a balancing of first-order reasons is blocked. This 'blocking' insulates decision-making from taking into account all other considerations that inform all reasons. Exclusionary reasons have a trumping effect. In the case of law, formal reasoning is an example of an exclusionary reasoning where substantive reasoning is neglected. Exclusionary reasons have a definite effect on the question of law's revisability. They displace any balancing process and are not revisable. As a direct consequence of exclusionary reasons not being revisable, the containment thesis does not hold. In the light of these facts, Christodoulidis concludes that the exclusionary is the opposite of the reflexive. Legal rules as exclusionary cannot allow for their own revisability in view of substantive, moral and political concerns. Law cannot contain conflict and revisability and is not reflexive as politics is.³⁸

Following Christodoulidis's argument, we have seen that civic republicanism, by claiming that the law can contain politics, impoverishes the political by inserting a prioris at the sites of contestation. Reflexive politics rests on contingency and self-reference. Where law is reductive, politics should be reflexive. 'Reflexivity is an invitation to think something through; a reduction is a reason not to. ... Reduction means simplification.'³⁹

As regards the argument about the reflexivity of politics and the reduction of law to community, Christodoulidis questions the assumption that the legal category of 'citizenship' contains community. For him this assumption implies that 'we have already accepted the existence and nature of the communal bond and no longer have to 'think about it' and be reflexive about its existence'.⁴⁰ A political reflection on such a description of community will remain interpretative and accordingly will leave the question of the role of difference in the description of community open. The 'real' question about community will be to situate the question of what constitutes a community within the community with the effect that a 'shifting pattern of communities' will be created 'around understandings that, for the time, seem adequate to hold together people in community'.⁴¹ Christodoulidis describes his notion of community as 'fragile' in its articulation of its 'shared commitment'. This notion of community is dynamic and 'exists in time.'

37 Christodoulidis *Law and Reflexive Politics* (note 4 above) 227; J Raz *Practical Reason and Norms* (1975) See also 'The Irrationality of Merciful Legal Judgement: Exclusionary Reasoning and the Question of the Particular' (1999) 18 *Law and Philosophy* 215–241.

38 Christodoulidis *Law and Reflexive Politics* (note 4 above) 227–233.

39 Christodoulidis 'Law, Love and the Contestability of European Community' in H Petersen (ed) *Law and Love in Europe* (1998) 53.

40 Christodoulidis 'Law, Love' (note 40 above) 59. See also Z Bankowski & EA Christodoulidis 'Citizenship Bound and Citizenship Unbound' in K Hutchings & R Dannreuther (eds) (1999) *Cosmopolitan Citizenship* 83–104; Z Bankowski & EA Christodoulidis 'The European Union as an Essentially Contested Project' (1998) 4 *European LJ* 341–354.

41 Christodoulidis 'Law, Love' (note 40 above) 59.

Community comes about around a political/ethical understanding both capable of upholding a commitment, and dynamic, always potentially disruptable internally: and with no measure of authority, force, persuasion and violence capable of upholding it externally.⁴²

This notion of community is explained by distinguishing between love and law, politics and law, and community and law. Christodoulidis connects these distinctions with the distinction between the reflexive and the reductive – the reflexive being the horizon of love and the reductive the horizon of law. Law cannot recognise particularity but will revert to generality and universality. For this reason he argues that we cannot rely on law to provide a basis for community eliding the ‘particularities of our attachment’.⁴³ The reductive nature of law tends to simplify (reduce) difference, particularities, ‘the multiple contingency of communication’ to a template.⁴⁴ Love is about collective identity, community and commonality. As Christodoulidis puts it: ‘[I]ts constitutive moment lies therein.’ Although law is also about interconnectedness, its reductive nature will limit the ways in which we can understand and contest the possibility of collective nature. Legal person, citizen and spouse in contrast to the reflexivity associated with political actor and lover are reductive notions. This is explained with reference to the different time modalities between the legal and the loving relationship – love and marriage operate with different time horizons. ‘Love exists only in the “not yet”, one can never have loved enough. Love lies in the promise of future fulfilment, its actual fulfilment signals its end.’⁴⁵ It is impossible to bind love in the time span of a legal relationship. Any attempt to institutionalise permanence ‘achieves nothing but a semblance of permanence which is intolerable to love. Because love thrives on change, its existence over time is dynamic; it requires “die Formen zu wechseln und immer Neues zu verzeuern”’.⁴⁶ The law is about the settling of contingency, about combining and thereby simplifying oppositions to one, about stilling, about providing some security of expectations.

Christodoulidis, following Luhmann, names three dimensions in which law’s reductions occur: ‘temporal’, ‘social’, and ‘material’. Along the temporal dimension, law reduces uncertainties by providing normative expectations. Along the social dimension, law will abstract otherness into an impersonal context and create a legal personality. Along the material dimension, law will only focus on a limited pool of possibilities. These three dimensions in which law’s reduction can be followed capture the tension between a loving and a legal expectation. In law, in contrast to love, the legal person’s expectation will turn normative where the law comes into play and provides a remedy for the frustrated expectation. What will count in love is what the lover normatively expects of the concrete other, the beloved. Material thresholds cannot be set in love; normative thresholds are not impersonal but interpersonal.

If community and politics are paired on the side of love and the reflexive, it becomes clear why law cannot contain our aspirations for politics or community. Law, because of its reductive and limited nature, its inherent structural tendency to still, simplify and institutionalise, cannot voice a divergent plurality that is continuously dissonant and contested.

42 Christodoulidis ‘Law, Love’ (note 40 above) 59.

43 Christodoulidis ‘Law, Love’ (note 40 above) 3.

44 Christodoulidis ‘Law, Love’ (note 40 above) 54.

45 Christodoulidis ‘Law, Love’ (note 40 above) 55.

46 Christodoulidis ‘Law, Love’ (note 40 above) 55.

IV THE MYTH OF THE 'COMMON' AND THE 'EMPTY' COMMUNITY

Andrew Norris⁴⁷ investigates the significance of Nancy's views on community and politics by asking 'how ought we to conceive of political community and its relation to political judgement?' Nancy makes a strong argument against the understanding of politics as an expression of identity as articulated by civic republicanism. For Nancy, community is our native state. Individualistic or atomistic political approaches violate this. However, civic republican or communitarian politics that conceive the community in terms of identity repeats the same violence: 'instead of reifying the individual, the theorist of community identity reifies the community'.⁴⁸ In Nancy's formulation: 'Freedom is ... singular/common before being in any way individual or collective'.⁴⁹

Nancy perceives of our being as that of *being-in common*. In other words a community is not formed when a set of independent and self-sufficient beings unite. 'Our relations are instead constitutive of who we are'.⁵⁰ Norris explains Nancy's writings on the community as an articulation of Heidegger's ontology.

We are primarily an experience of plurality and of sharing; we are open to another in a more primordial sense than we are persons. Nancy's understanding of community should not be seen as similar to the communitarian claims by, for example, Sandel or Taylor stating that we are constituted by our relations. This is an understanding of community that Nancy rejects. For him the community should not be understood as 'being a subject of the same sort as the individual'.⁵¹ The reason for this is that this understanding will only produce a politics of identity in which different identities and interests are opposed to each other. To conceive of the community as a subject with an identity immanent to it implies the community as a 'subject-work'.

Norris explains that if one's 'true' or 'higher' or 'more universal' self is found in one's shared communal identity, the work of politics will be to acknowledge and create that immanent communal identity. This will not only involve conflict with other political identities, but also with the purification of one's own community. In Nancy's formulation: 'Community understood as work or through its works would presuppose that the common being, as such, be objectifiable and producible'.⁵²

Norris acknowledges Nancy's debt to Hannah Arendt with reference to her 'attack' in *The origins of totalitarianism*⁵³ on political theories that centre on rights. She argues that we should recognise a basis of civil rights, 'the right to have rights' through political action. Human rights should be seen as forms of human action, not a set of moral truths. To concentrate on rights that are attached to politically passive and invisible legal subjects could lead to misdirection in our resistance to totalitarianism.⁵⁴ Nancy follows her argument with his contention that the struggle against totalitarianism and 'ethnic cleansing' will be unsuccessful if we only resist

47 A Norris 'Jean-Luc Nancy and the Myth of the Common' (2000) 7 *Constellations* 272–295. See also J-L. Nancy *The Experience of Freedom* (1993) and 'Of Being Singular Plural' in *Being Singular Plural* (2000) 1–99.

48 Norris 'Jean-Luc Nancy' (note 48 above) 273.

49 Nancy (1993) *The Experience of Freedom* 74; Norris 'Jean-Luc Nancy' (note 48 above) 273.

50 Norris 'Jean-Luc Nancy' (note 48 above) 274.

51 Norris 'Jean-Luc Nancy' (note 48 above) 275.

52 Norris 'Jean-Luc Nancy' (note 48 above) 275; Nancy *The Inoperative Community* (1991) 13.

53 Arendt *The Origins of Totalitarianism* (1951).

54 Norris 'Jean-Luc Nancy' (note 48 above) 276.

them by supporting a rival community (like a community based on human rights law). This highlights the question concerning the relationship between civilization and totalitarianism.

Nancy notes the 'logic of fascism', the fact that Nazism (or apartheid we can add) made all too much sense to all too many people. Norris notes that for Nancy we, like the Nazis, subscribe to the assumption that politics and community can be understood in terms of a shared substantive identity. What community is, has been misunderstood. Instead of thinking of *being-in-common* community has been replaced with an essence of community.⁵⁵

Such a thinking – the thinking of community as essence – is in effect the closure of the political because it assigns to community a *common being*, whereas community is a matter of something quite different, namely existence in so far as it is *in common* without letting itself be absorbed into a common substance. Being in common means no longer having, in any form, in any empirical or ideal place, such a substantial identity, and sharing 'this lack of identity'. This is what philosophy calls 'finitude'.⁵⁶

Finitude means the inability to contain the world or ourselves, the inability to be absolutely self-sufficient. Our being-in-commonness is defined by plurality and difference. In other words, our difference is what we have in common; we are in relation to each other because of our difference. The essence of community therefore is plurality, not identity. What we share is this difference. The true community is thus the idle or empty community, idle because it lacks an essence that can be produced and put to work, empty because it contains no subjects. Subjectivity will bring an end to difference and plurality and will deny our finitude. If we are infinite, we are 'absolutely non-relational'. Norris explains that a theory of self-production (or autopoiesis) provides an explanation of how the subject might give birth to itself. The theory of self-production is linked to totalitarianism and the nihilism of movements like National Socialism. However, self-production of the subject is impossible. In Nancy, myth represents our foundation and myth is not something that we can get 'outside of – we can only 'interrupt' it, which is to say deconstruct it from within'.⁵⁷

Norris argues that the work of Jean Jacques Rousseau offers a good example of the approach to community and politics that Nancy rejects. His theory of community as common being and autonomy is one of autopoiesis or self-production. In Rousseau a metaphysical community replaces the nature we have lost, that of the general will which allows us to recognise and realise our true immanent identity. The general will as a true form of will is unified and cleansed of difference.⁵⁸ His account of community is a perfect example of a mythic account of the autofunctioning of humanity.

Norris responds to Nancy by saying that although his work fundamentally challenges our understanding of the political community, he does not give a helpful account of judgment. The reason for this is Nancy's neglect to consider the connections between the advent of modern scepticism regarding common sense and public judgment and the rise of theories of autopoiesis. Social contract theory rests on an ontological fantasy of autonomy and autopoiesis. For Norris it is also a response to a practical political problem, namely, the problem of judgment that cannot be understood in isolation from the aporia of judgment that in part motivates it. The problem also relates to the intellectual scepticism that preceded modern

55 Norris 'Jean-Luc Nancy' (note 48 above) 276.

56 Norris 'Jean-Luc Nancy' (note 48 above) 277, Nancy *The Inoperative Community* (note 53 above) xxxviii.

57 Norris 'Jean-Luc Nancy' (note 48 above) 280.

58 Norris 'Jean-Luc Nancy' (note 48 above) 281.

contract theory.⁵⁹ He says Nancy's analysis of the paradoxes of political community is of much use but he criticises Nancy's willingness to accept deconstructive aporias. In other words, according to Norris, Nancy neglects to provide an alternative for good judgment. According to Norris, Nancy does not challenge the aporetic conception of judgment with the result that a political philosophy 'strangely removed from the political' is brought forth. He continues: 'Politics, after all, is a matter of how we act together in concert, what things we judge to be right and wrong. To say of decision that it is empty, and radically undermined, makes politics seem arbitrary and haphazard – indeed, it may actually encourage it to be so.'⁶⁰ He concludes by describing Nancy as 'more of a liberal than he knows' subscribing to a position of 'the less politics the better' where 'civic virtues, skill in public deliberation, the wise exercise of common sense' has no 'inherent value.'

It is not my aim here to either support or challenge the critique levelled by Norris on Nancy's approach to community and politics. However, I think we should adhere to the vision of community and politics as set out by Nancy in our contemplations on South African community. Below I shall support critical comments on the attempts of nation-building and the creation of a hegemonic nation by the South African government utilising human rights. Christodoulidis's critique of civic republicanism and his notion of the community and politics as reflexive are supplemented by Nancy's understanding of the community as empty and idle. However, Norris's critical questioning of Nancy is important for our critical engagement with Michelman. Michelman is also concerned about the issues raised by Norris. My question is whether the critiques on a civic republican approach to community and politics make Michelman's 'law's republic' impossible. In other words do we need to reject his work totally if we want to commit ourselves to the reflexivity of love, politics, and community and thus resist the reductiveness of law? What does Michelman's work imply for the commitment to an empty and idle community that rejects any form of immanent subjectivity? And what does this commitment imply for and understanding of Michelman's work?

V SOUTH AFRICAN COMMUNITY AS IMPOSSIBLE YET IMAGINABLE

The past decade has brought many attempts of construction and reconstruction of South African community and politics. I admit that initially I was sceptical about such attempts, but yet prepared to give these notions a chance. Coming from a past where totalitarianism dominated all notions of community and politics, I hoped for the possibility of community and politics that would allow for openness, heterogeneity and difference. However, most of the attempts followed were reductive and limited, rooted in law and legal politics.

Richard A Wilson, in a work that comments on the South African Truth and Reconciliation Commission, makes significant observations regarding the processes of transformation and the reconstruction of politics and community.⁶¹ He focuses on the kind of 'procedural liberalism' that dominated transitions from authoritarian societies like postcommunist societies as well as post-apartheid South Africa. Human rights legislation became a central component in establish-

59 Norris 'Jean-Luc Nancy' (note 48 above) 282.

60 Norris 'Jean-Luc Nancy' (note 48 above) 285. Norris here also refers to Nancy's work on 'authenticity' and argues that it is not sufficient to guide us in judgment. 'If our engagement with our political identity is to be a meaningful one, it cannot be constantly undercut by irony.' (at 287)

61 See in general R Wilson *The Politics of Truth and Reconciliation in South Africa. Legitimizing the Post-apartheid State* (2001).

ing the rule of law and legitimacy, and human rights were detached from their 'strictly legal foundations' to become a 'generalized moral and political discourse'.⁶² He places this approach to justice in transition in the context of nation-building and a hegemonic project of state formation and exposes how new regimes (like the South African one) use human rights and the law to 're-imagine the nation by constructing new official histories.'⁶³ Nancy's exposure of myth comes to mind in Wilson's exposure of how the 'writing of a new official memory is central to state strategies to create a new hegemony in the area of justice and construct the present moment as post-authoritarian when it includes many elements of the past'.⁶⁴ He shows how the TRC's account of the past was constrained by its excessive legalism and positivist methodology. Human rights discourse and institutions have also failed to address South African legal pluralism. For him a reason for the failure is that human rights were 'fetishized' in an attempt to treat them as a 'full-blown political and ethical philosophy'.⁶⁵ His argument, like Christodoulidis's and more implicitly Nancy's, rests on the limits of the law and human rights to provide for politics and community.

The way in which the constitutional court addresses the issue of citizenship, community and civil society is also reflective of a limited and reductive approach. Citizenship functions as a legal category and the politics associated with it is a politics stilled from contestation and dynamics. In *City Council of Pretoria v Walker*⁶⁶ Sachs J argued that the case was actually about 'the spirit of *civic responsibility*' and about 'the *rights* and *responsibilities* of *citizenship*'. He noted that the people of Atteridgeville and Mamelodi had previously used non-payment as a 'weapon to secure full citizenship rights for themselves'. The promulgation of the new constitution was the beginning of an era where everyone could enjoy citizenship rights. Pretoria had to be reconstructed and part of this process entailed that previous inequalities and difference had to be taken into account by the council. For Sachs an important task facing the council was 'the need to re-establish the *rule of law*' and to achieve 'acceptance by all inhabitants of the city of the entitlements and responsibilities that went with municipal citizenship'. He sees the task of the city council as one of *integration* and creating a *united* city. The view of community articulated by the judge is one of unity and harmony that can be achieved because the foundation of this community is the rule of law and the normative expectations of rights and responsibilities. This is a good example of how a community that is founded on law and regulated by the legal definition of citizenship is reduced in contrast to the vision of community that is, like love, reflexive, not-yet and contested. Implicitly we can also see the support of an immanent identity that must be put to work to form the subject, the community.

Without going into any detail here, the equality jurisprudence of the Constitutional Court could also be seen as supportive of the government's aim of nation-building and the creation of a new hegemony. The noble ideal of substantive equality has become nothing but a liberal-formalist way of yet again reducing difference and particularity. Instead of treating the right to equality at the political level, as Arendt argues we should, the right has become legalised, devoid of its political potential. The consistency that Pierre de Vos⁶⁷ identifies in the seemingly contrasting decisions of the Constitutional Court in *Soobramoney* and *Grootboom* shows how these decisions tie in with the

62 Wilson *Politics of Truth and Reconciliation* (note 62 above) 1–30.

63 Wilson *Politics of Truth and Reconciliation* (note 62 above) 4.

64 Wilson *Politics of Truth and Reconciliation* (note 62 above) XVI.

65 Wilson *Politics of Truth and Reconciliation* (note 62 above) 224.

66 1998 (3) BCLR 257 (CC).

67 P de Vos 'Grootboom, the Right to Access to Housing and Substantive Equality as Contextual Fairness' (2001) 17 *SAJHR* 258–276.

universalising grand-narratives of transformation and substantive equality. De Vos argues that the Constitutional Court has embraced the ideal of transformation in its acceptance of a contextual approach to interpretation. This contextual approach embraces both textual context (the positive and negative duties that are placed on the state) and the wider social and historical context (the apartheid history of racist politics, discrimination and exclusion as well as social and economic conditions). For De Vos the best way of achieving the transformative vision is on the basis of substantive equality. The right to equality and socio-economic rights are thus closely related. The seeming contrast in the two cases of *Soobramoney*⁶⁸ and *Grootboom*⁶⁹ can be explained through the approach of substantive equality. Soobramoney's case, an application to the court for an order compelling the KwaZulu-Natal health department to provide access to kidney dialysis treatment, just did not fit the grand scheme of transformation to be achieved via the approach of substantive equality. *Grootboom*, where a homeless community sought an order to provide housing to the most vulnerable sections in society, did fit. As De Vos explains, these two judgments are 'perfectly consistent as long as one views them within the context of the Constitutional Court's transformative vision on the Constitution and its attendant acceptance of the substantive idea of equality.'⁷⁰ I have argued elsewhere that I agree with De Vos's analysis of the consistency between the *Soobramoney* and *Grootboom* cases. However, this consistency troubles me. It illustrates the rigidity of an approach fixed on a certain instrumental or structural vision of transformation (and equality) that does not leave room for the protection of dignity and the 'imaginary domain'.⁷¹ A necessary link that must be made is the link with the government's aim of and general mainstream discourse on nation-building and hegemonisation. The implications that such an approach has for South African community and politics cannot be ignored.

A necessary question in this context is whether Michelman's republic would uncritically accept these grand-narrative type structural schemes that exclude not only politics but plurality as well. Towards the end of 'Law's Republic' Michelman forwards an argument for a different understanding of privacy. He wants to recast the use of privacy (traditionally understood as the right to a private space safeguarded against public or political intrusion) to a political right. The search is for a conception of rights that could bridge the personal and the political.

The argument realigns our accustomed sense of the relation between privacy and political freedom by regarding privacy not only as an end (however controversial) of liberation by law but also as such liberation's constant and regenerative – jurisgenerative – beginning. The argument forges the link between privacy and citizenship.⁷²

Problematic as this statement can be because of the link with the legal concept of citizenship and the underlying trust in the 'Constitution to ground our identity as a political community by also inviting us to self-revision through debate over its meaning',⁷³ the emphasis on privacy and intimacy could be a way of safeguarding a space for plurality and difference. If privacy is seen as significant and is linked with the public, one would hope that the treasured moments of the private and the intimate (the realities of difference, non-conformity to the institutional) can also to be adhered to in the public. I understand Michelman's understanding of privacy as being

68 *Soobramoney v Minister of Health, KwaZulu-Natal* 1988 (1) SA 765 (CC).

69 *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC).

70 P de Vos 'Grootboom' (note 68 above) 259.

71 D Cornell "'No Last Word' – Reflections on the Imaginary Domain, Dignity and Intrinsic Worth' (2002) 12 *Stell LR* 299–308.

72 Michelman 'Law's Republic' (note 5 above) 1534–1535.

73 Michelman 'Laws Republic' (note 5 above) 1536.

similar to Drucilla Cornell's understanding of dignity that she protects through the right to the imaginary domain. The imaginary domain is 'that psychic and moral space in which we as sexed creatures who care deeply about matters of the heart, are allowed to evaluate and represent who we are.'⁷⁴ Freedom entails the space for the 'renewal of the imagination and the concomitant re-imagining of who one is and who one seeks to become.'⁷⁵ What we should note is that the law is not the main vehicle for achieving equality for Cornell. 'Any law that gives us a substantive definition of what constitutes actual freedom for the individual would violate her right to self-representation of her sexuate being.'⁷⁶

These affinities for privacy and dignity and freedom seem to revert to classic liberalism. Indeed, Michelman undeniably has liberal sentiments that clearly also distinguish his work from regular republicanism and communitarianism. And the extent to which his republic allows for plurality and difference can certainly be attributed to these classic liberal ideas. This is why his notion of politics and community can never be associated with the reflexive horizon of love. Law's republic is founded on the constitution with the firm belief that our identity as a political community can be grounded in the constitution. But this is also why his notion of community could escape the static structural and institutionalised approach articulated in the South African examples above. If we can read Michelman as a hybrid thinker, one who occupies a space between liberalism and civic republicanism, we can find interesting nuances that can open ways of contemplating law, politics and community other from the known and the traditional. The question raised by Norris in his analysis of Nancy, namely how ought we to conceive of political judgment in the face of scepticism, a question that is also a concern for Michelman, should be considered as a significant question also for present South African approaches to law, politics and community. Like the critical reflections of Norris on the work of Nancy, we could also question Christodoulidis's reliance on anarchistic politics and disregard of critical attempts to address the limits of the law.

What does my vision of South African community look like? Following the arguments discussed above, this vision is not only impossible to describe, it is impossible. Community like love, following Christodoulidis, exists only in the not-yet. We need to be careful of the 'suspect intimacies' drawn between community and law (or explicitly the Constitution) and between politics and law (constitutional politics). Similarly, we should view community as open-ended and fluid and not as an 'immanent subjectivity'. South African community can only be conceived of in terms of the 'inoperative', the 'empty' and 'idle' community acknowledging finitude. From here multiple ways of community can be imagined taking difference, contestation and disunity as endless starting points.

The space between what's wrong and right
Is where you'll find me hiding, waiting for you
The space between your heart and mine
There's space to fill the time,
Space between.

– 'The Space Between', *Everyday*
Dave Matthews Band

74 D Cornell (1998) *At the Heart of Freedom* x.

75 Cornell *Heart of Freedom* (note 75 above) 5.

76 Cornell *Heart of Freedom* (note 75 above) 24.

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ROBERT WALMSLEY

University Professor
Harvard University

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Some of the themes covered in Rights & Democracy are:

- Legal indeterminacy and the politics of law.
- The ability of a legal system to rise above instrumental politics.
- The relation between democracy and rights and the problem of democratic self-government.
- Questions of alterity and difference.
- The need for judges to engage in practical reasoning and judgement.
- Issues of social justice, socio-economic rights and the need to subject private-law institutions and social and economic power relations to a transformative critique.

The twelve essays in this book pay tribute to senior Harvard Law Professor Frank Michelman whose thinking - and input - on Constitutional Law has made a great contribution to constitutional development in South Africa. They are the work of some of the best practical and academic legal minds in this country and, given South Africa's recent successes in this field, represent an advanced position in constitutional thinking in the world.



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